

No. 15010

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United States  
Court of Appeals  
for the Ninth Circuit

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CLIFFORD O. BOREN, DELTA M. BOREN and  
CLIFFORD O. BOREN CONTRACTING CO.,  
INC., Appellants,

vs.

LLOYD M. TUCKER, Special Agent, Internal  
Revenue Service, Appellee.

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Transcript of Record

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Appeal from the United States District Court for the Southern  
District of California, Southern Division

FILED

MAY -7 1956

PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

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United States Attorney,  
EDWARD R. McHALE,  
Asst. U. S. Attorney, Chief Tax Division,  
600 Federal Building,  
Los Angeles 12, California. [1\*]

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\* Page numbers appearing at foot of page of original Transcript of Record.



In the United States District Court for the Southern District of California, Southern Division

Civil No. 1780-SD

LLOYD M. TUCKER, Special Agent, Internal  
Revenue Service, Petitioner,

VS.

CLIFFORD O. BOREN CONTRACTING CO.,  
INC., a California corporation, CLIFFORD O.  
BOREN, President, CLIFFORD O. BOREN  
CONTRACTING CO., INC.; and DELTA M.  
BOREN, Vice - President, CLIFFORD O.  
BOREN CONTRACTING CO., INC.,  
Respondents.

PETITION FOR ORDERS OF ATTACHMENT  
OF PERSON FOR CIVIL CONTEMPT  
(Internal Revenue Code of 1954, Section 7604)

Your petitioner, Lloyd M. Tucker, Special Agent, Internal Revenue Service, respectfully represents as follows:

I.

This action arises and jurisdiction is granted this Court under the provisions of the Internal Revenue Code of 1954, 68A Stat., Sections 7402, 7602, 7603, 7604, 7605; Federal Rules of Civil Procedure 64, 81(a)(3); and Title 28 United States Code, Sections 1340 and 1345.

## II.

That petitioner is a duly appointed and acting Special Agent of the Internal Revenue Service and has been authorized by the Secretary of the Treas-

ury to perform the duties of such office and, specifically, the duties referred to in Sections 7603 and 7604 of the Internal Revenue Code, 1954. [2]

### III.

At all times herein mentioned the Internal Revenue tax liability of Clifford O. Boren and Delta M. Boren for the calendar years 1950 and 1951 was, and is, under inquiry and determination by the Internal Revenue Service; your petitioner has reasonable cause to believe that said taxpayers may have filed false or fraudulent returns with intent to evade the tax or may have wilfully attempted to defeat or evade the taxes imposed by the Internal Revenue Code.

### IV.

The respondent Clifford O. Boren Contracting Co., Inc., is a corporation duly organized and existing under the laws of the State of California and has its principal office in the City of San Diego, California.

### V.

Respondent Clifford O. Boren Contracting Co., Inc., or respondent Clifford O. Boren, its President, or respondent Delta M. Boren, its Vice-President, in their capacities as such, has possession, care, and custody of certain books, records, papers and data hereinafter set forth; said books, records, papers and data contain therein entries relating to the business of the aforesaid Clifford O. Boren and Delta M. Boren; said books, records, papers and data are material and relevant to said inquiry.



## VI.

Said books, records, papers and data are as follows: General Journal, Cash Journal, General Ledger, Payroll Records and Payroll Checks bearing the endorsement of any of the following named persons: Clifford O. Boren, Delta M. Boren, Marjorie H. Bell, Betty K. McCarthy, and the Clifford O. Boren Contracting Company, Inc., for the period from July 1, 1951 to December 31, 1951.

## VII.

On August 25, 1955, summonses were issued by petitioner to the respondents Clifford O. Boren Contracting Co., Inc., to Clifford O. Boren as President of Clifford O. Boren Contracting Co., Inc., and to Delta M. Boren as Vice-President of Clifford O. Boren Contracting Co., Inc., to appear before petitioner at 3755 Sixth Avenue, San Diego, California, on September 6, 1955, at 10:00 a.m., and there to testify and to produce among other documents said books, records, [3] papers and data. True and correct copies of each of said summonses are attached hereto as Exhibits "A," "B," and "C", respectively, and incorporated herein by reference as though set forth in full.

## VIII.

On August 25, 1955, at San Diego, California, summonses issued to Clifford O. Boren Contracting Co., Inc., and Clifford O. Boren, President, Clifford O. Boren Contracting Co., Inc., were personally served by delivering in hand to Clifford O. Boren

attested copies thereof; on August 25, 1955, at San Diego, California, the summons issued to Delta M. Boren, Vice-President, Clifford O. Boren Contracting Co., Inc., was served by leaving an attested copy with one Thelma Wertheimer, housekeeper for Delta M. Boren, at 4511 Utah Street, San Diego, California, the last and usual place of abode of Delta M. Boren.

### IX.

Respondents Clifford O. Boren, President of the Clifford O. Boren Contracting Co., Inc., and Delta M. Boren, Vice-President of the Clifford O. Boren Contracting Co., Inc., reside in San Diego County within the Southern District of California.

### X.

At the time and place set for hearing in the summonses served upon said respondents, there appeared Delta M. Boren, Clifford O. Boren, and John A. Brant, their attorney. Attached hereto and marked Exhibit "D", is a complete, true and correct copy of reporter's transcript of all the proceedings that then took place on September 6, 1955, at 3755 Sixth Avenue, San Diego, California, in the presence of petitioner and respondents.

### XI.

Respondents Delta M. Boren as Vice-President of the Clifford O. Boren Contracting Co., Inc., and Clifford O. Boren as President of the Clifford O. Boren Contracting Co., Inc., and the Clifford O. Boren Contracting Co., Inc., did each wilfully and

knowingly neglect and refuse to obey said summonses as [4] required in that said respondents did appear at the time and place set forth in the summonses but did not produce said books, records, papers and data.

Wherefore, your petitioner prays:

(1) That an attachment be issued against said Clifford O. Boren, President, Clifford O. Boren Contracting Co., Inc., and against Delta M. Boren, Vice-President, Clifford O. Boren Contracting Co., Inc., as for a contempt directed to the United States Marshal or his deputies, for the arrest of said Clifford O. Boren and Delta M. Boren, and that an order be issued therefor, or that in lieu thereof, said Delta M. Boren and Clifford O. Boren be ordered to show cause, if any there be, why an attachment should not be issued against them as for a contempt and why they should not be compelled to answer petitioner's questions and to produce said books, records, papers and data, and, further, why they should not be held in civil contempt.

(2) That if satisfactory proof be made, and no sufficient showing to the contrary shall appear, that this Court issue an attachment providing for the arrest of said Delta M. Boren and Clifford O. Boren, and compel said Clifford O. Boren and Delta M. Boren in their capacities as President and Vice-President, respectively, of Clifford O. Boren Contracting Co., Inc., to answer petitioner's questions and to produce said books, records, papers and data,

and for failure thereof to hold said Clifford O. Boren, Delta M. Boren and Clifford O. Boren Contracting Co., Inc., in civil contempt.

(3) That such further orders be made consistent with the law for the punishment of civil contempt, to enforce obedience to the requirement of said summonses as may be necessary in the circumstances.

(4) For such other and further relief as to the Court may seem just and proper.

LAUGHLIN E. WATERS,

United States Attorney

EDWARD R. McHALE,

Asst. U. S. Attorney, Chief, Tax  
Division

ROBERT H. WYSHAK and

BRUCE I. HOCHMAN,

HARRY D. STEWARD and

HOWARD HARRIS,

Asst. U. S. Attorneys,

/s/ By EDWARD R. McHALE,

Attorneys for Petitioner

[5]

Duly Verified. [6]

Petitioner's Exhibit No. 1.

[Endorsed]: Filed September 19, 1955.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon reading and considering petition of Lloyd M. Tucker, Special Agent, Internal Revenue Service, and good cause appearing therefor,

It Is Hereby Ordered that Clifford O. Boren, President, Clifford O. Boren Contracting Co., Inc., respondent, appear before this Court on the 24th day of October, 1955, at 10 o'clock a.m., or as soon thereafter as counsel may be heard, to show cause, if any there be, why an attachment should not issue against him as for a contempt and why he should not be compelled to answer petitioner's questions and produce books, records, papers and data referred to in said petition, and further why he should not be held in civil contempt.

It is further ordered that a certified copy of the petition and a certified copy of this order be served on said Clifford O. Boren by the United States Marshal within 10 days, after date hereof, and that such service shall be deemed to be sufficient for due notice.

Dated: This 19 day of September, 1955.

/s/ HARRY C. WESTOVER,

U. S. District Judge [17]

[Endorsed]: Filed September 19, 1955.

[Title of District Court and Cause.]

### ORDER TO SHOW CAUSE

Upon reading and considering petition of Lloyd M. Tucker, Special Agent, Internal Revenue Service, and good cause appearing therefor,

It Is Hereby Ordered that Delta M. Boren, Vice-President, Clifford O. Boren Contracting Co., Inc., respondent, appear before this Court on the 24th day of October, 1955, at 10 o'clock a.m., or as soon thereafter as counsel may be heard, to show cause, if any there be, why an attachment should not issue against her as for a contempt and why she should not be compelled to answer petitioner's questions and produce books, records, papers and data referred to in said petition, and further why she should not be held in civil contempt.

It is further ordered that a certified copy of the petition and a certified copy of this order be served on said Delta M. Boren by the United States Marshal within 10 days, after date hereof, and that such service shall be deemed to be sufficient for due notice.

Dated: This 19th day of September, 1955.

/s/ HARRY C. WESTOVER,

U. S. District Judge [18]

[Endorsed]: Filed September 19, 1955.



[Title of District Court and Cause.]

AFFIDAVIT OF LLOYD M. TUCKER IN OP-  
POSITION TO PLAINTIFFS' MOTION  
FOR PRELIMINARY INJUNCTION

United States of America,  
Southern District of California,  
Central Division—ss.

Lloyd M. Tucker, being first duly sworn, deposes  
and says:

That affiant is now and has been for the last nine  
years a Special Agent of the Internal Revenue  
Service and for the four years last past has been  
assigned to the San Diego Office of the Internal  
Revenue Service. That his duties primarily concern  
the investigation of alleged evasions of income taxes  
and matters related thereto in the enforcement of  
the Internal Revenue laws.

That he was assigned to the investigation of the  
tax liability of Clifford O. Boren and Delta M.  
Boren for the years 1950 and 1951. That he com-  
menced his examination on October 20, 1954, and  
during the course of this investigation and on Octo-  
ber 20, 1954, he first met plaintiffs' counsel and  
agent, John A. Brant, and stated that he wished to  
examine the proprietorship books and records [19]  
maintained by Clifford O. Boren and Delta M.  
Boren, for the years 1950 and 1951. On that date  
Mr. Brant advised that neither affiant nor Internal  
Revenue Agent Forrest P. Calkins, who also had  
been assigned to the case, could examine said rec-

ords or hold any conversations with Mr. or Mrs. Boren. Prior to that date, neither Forrest P. Calkins nor affiant had been engaged in any examination of plaintiffs' income tax returns.

Your affiant did not ask plaintiffs' counsel's permission to examine the books and records of Clifford O. Boren Contracting Co., Inc., until December 7, 1954; that plaintiffs' counsel, John A. Brant, first stated on that date that he would not make such records available; that he further stated he would require a Commissioner's summons to be served before he would permit either affiant or Agent Calkins to examine said records; that later on the same day, Mr. Brant stated he would not require a summons but that he would require that Forrest P. Calkins be formally assigned to the examination of said tax returns; and it was not until December 15, 1954, that affiant and Forrest P. Calkins commenced the examination of the records of the Clifford O. Boren Contracting Co., Inc.

Preliminary investigation of the taxable years 1950 and 1951 of the Borens shows that in excess of \$40,000.00 of taxable income was not reported by the taxpayers as required by law. No evidence has been discovered to date tending to show that this nondisclosure was due to mistake, inadvertence, or other justifiable or legal reason, or tending to show that it was not done with the purpose and intent to evade and defeat the payment of the taxpayers' income taxes.

In connection with affiant's aforesaid investiga-



tion of the tax liability of Clifford O. Boren and Delta M. Boren, for the years 1950 and 1951, examination of the Clifford O. Boren Contracting Co., Inc., records was made by affiant and Forrest P. Calkins on only the following dates: December 15, 1954; December 16, 1954, 9:00 a.m. to [20] 12:10 p.m.; January 19, 1955; February 11, 1955; and on July 11, 13, 14, and 15, 1955. During the July period, examination was conducted only for less than half of each day, owing to the state of health of plaintiffs' counsel, John A. Brant, who insisted on the examination being conducted only in his presence.

That your affiant and Internal Revenue Agent Calkins have been denied access to the books and records of the Clifford O. Boren Contracting Co., Inc. from and after July 15, 1955, although they have not completed their investigation into the correctness of the tax returns filed by Clifford O. Boren and Delta M. Boren.

That a further examination of the books, records, papers, etc., of the Clifford O. Boren Contracting Co., Inc., to determine the correctness of the tax returns filed by Clifford O. Boren and Delta M. Boren, is necessary and reasonable and that the issuance of summonses to the Clifford O. Boren Contracting Co., Inc. and to the responsible officers and custodians, Clifford O. Boren, President, and Delta M. Boren, Vice-President, was necessary and reasonable in the circumstances.

/s/ LLOYD M. TUCKER

Subscribed and sworn to before me this 19 day of September, 1955.

[Seal]                      JOHN A. CHILDRESS,  
Clerk United States District Court, Southern District of California. Signed by Mary O. Smith, Deputy. [21]

Petitioner's Exhibit No. 2.

[Endorsed]: Filed September 19, 1955.

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[Title of District Court and Cause.]

### ORDER TO SHOW CAUSE

Upon reading and considering petition of Lloyd M. Tucker, Special Agent, Internal Revenue Service, and good cause appearing therefor,

It Is Hereby Ordered that Clifford O. Boren, President, Clifford O. Boren Contracting Co., Inc., respondent, appear before this Court at San Diego, on the 24th day of October, 1955, at 10 o'clock a.m., or as soon thereafter as counsel may be heard, to show cause, if any there be, why an attachment should not issue against him as for a contempt and why he should not be compelled to answer petitioner's questions and produce books, records, papers and data referred to in said petition, and further why he should not be held in civil contempt.

It is further ordered that a certified copy of the petition [22] and a certified copy of this order be served on said Clifford O. Boren by the United States Marshal within 10 days, after date hereof,

and that such service shall be deemed to be sufficient for due notice.

Dated: This 30th day of September, 1955.

/s/ LEON R. YANKWICH,

U. S. District Judge [23]

[Endorsed]: Filed September 30, 1955.

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[Title of District Court and Cause.]

MOTION TO VACATE ORDER TO SHOW  
CAUSE

To: Lloyd M. Tucker, and Laughlin E. Waters,  
United States Attorney, and Edward R. Mc-  
Hale, Assistant United States Attorney, his at-  
torneys:

Please Take Notice that on the 17th day of Oc-  
tober, 1955, at 10:00 o'clock a.m., or as soon there-  
after as counsel can be heard, respondents and each  
of them, will move the above-entitled Court for an  
order vacating the Orders to Show Cause issued out  
of the above-entitled Court on September 19, 1955,  
on the ex parte application of petitioner and di-  
rected to Clifford O. Boren Contracting Co., Inc.,  
and Delta M. Boren, and vacating the Order to Show  
Cause issued out of the above-entitled Court on  
September 30, 1955 on the ex parte application of  
petitioner and directed to Clifford O. Boren.

Said motion will be made upon the grounds that  
the petition fails to state a claim upon which an at-

tachment against the respondents, or either of them, could issue as for a contempt, and fails to state a claim upon which respondents, or either of them, could be held in civil contempt. [24]

Said motion will be based upon this notice of motion, the petition on file herein, and Memorandum of Points and Authorities attached hereto.

Dated: October 5, 1955.

TORRANCE & WANSLEY,  
/s/ By JOHN A. BRANT,  
Attorneys for Respondents [25]

[Endorsed]: Filed October 5, 1955.

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[Title of District Court and Cause.]

## MEMORANDUM IN OPPOSITION TO RE- SPONDENTS' MOTION TO VACATE OR- DER TO SHOW CAUSE

Petitioner Lloyd M. Tucker in his capacity as Special Agent of the Internal Revenue Service has issued summonses to the respondents as authorized by Section 7602 of the Internal Revenue Code of 1954. This Court upon request of petitioner issued Orders to Show Cause ordering respondents to appear before this Court and show cause, if any, why they should not be compelled to answer questions and produce books, records, papers, and data and why an attachment should not be issued.

Section 7602 of the Internal Revenue Code of 1954 provides that the Secretary or his delegate may issue a summons to any person to testify and produce such books, papers and other data as may be relevant or material to the inquiry being made. [29] Section 7603 of the Internal Revenue Code of 1954 provides for the method of service of such summons. Section 7604 of the Internal Revenue Code of 1954 provides for the enforcement of the summons. In their Memorandum of Points and Authorities, respondents seek to show that there are two kinds of summonses. One issued by the Collector and one issued by the Commissioner and cites cases holding that a Commissioner's summons needs the aid of the Court to compel attendance while contempt proceedings may ensue immediately should a Collector's summons be disregarded. Respondent correctly states the situation which obtained under the Internal Revenue Code of 1939; however, the Internal Revenue Code of 1954 broadened the old Collector's summons (Section 3615, Internal Revenue Code of 1939) to encompass any summons issued by the Secretary or his delegate. Section 7604 (b) of the Internal Revenue Code of 1954 specifically provides that when a person refuses to testify or produce books, data, etc., the Secretary or his delegate may apply to the Judge of the United States District Court for an attachment against such person for contempt.

The Orders to Show Cause were properly issued by this Court in compliance with Section 7604(b) of the Internal Revenue Code of 1954.

Dated: October 14, 1955.

LAUGHLIN E. WATERS,

United States Attorney

EDWARD R. McHALE,

Asst. U. S. Attorney, Chief, Tax  
Division

ROBERT H. WYSHAK and

BRUCE I. HOCHMAN,

HARRY D. STEWARD and

HOWARD HARRIS,

Asst. U. S. Attorneys

/s/ EDWARD R. McHALE,

Attorneys for Petitioner

[30]

[Endorsed]: Filed October 14, 1955.

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[Title of District Court and Cause.]

ANSWER TO PETITION FOR ORDERS OF  
ATTACHMENT OF PERSON FOR CIVIL  
CONTEMPT

Your Respondents Clifford O. Boren, Delta M. Boren, and Clifford O. Boren Contracting Co., Inc. answer the Petition for Orders of Attachment of Person For Civil Contempt in the above-entitled matter and admit, deny and allege as follows:

I.

In answer to paragraph III of the Petition, admit that the Internal Revenue tax liability of Clifford O. Boren and Delta M. Boren for the cal-



endar years 1950 and 1951 was under inquiry and determination by the Internal Revenue Service, and alleges that said tax liability has been determined. Except as expressly admitted, deny each and every allegation in said paragraph.

## II.

In answer to paragraph V of the Petition, admit that respondents have possession, care and custody of certain books, records, papers and data set forth in the Petition. Except as expressly admitted, [31] deny each and every allegation in said paragraph.

## III.

In answer to paragraph XI of the Petition, deny each and every allegation in said paragraph contained, and allege that in response to said summons they appeared before petitioner, produced the books and records summoned, and testified, but refused to permit the examination of said books and records for the reasons set forth in Exhibit D attached to the Petition.

For a second and separate defense to the Petition, respondents allege:

One Inspection of the Books of Account of Clifford O. Boren Contracting Co., Inc. Has Been Made in Connection with the Tax Liability of Clifford O. Boren and Delta M. Boren for 1950 and 1951.

## I.

Agents of the Bureau of Internal Revenue commenced the examination of the federal income tax

returns of Clifford O. Boren and Delta M. Boren for the taxable years 1950 and 1951 on or about November 2, 1953. The books of account of Clifford O. Boren Contracting Co., Inc. were available for examination, and former Revenue Agent Charles D. Ford represented to Delta M. Boren that information had been obtained from the corporation.

## II.

From the commencement of the examinations and until September 8, 1954, Clifford O. Boren and Delta M. Boren made available to Revenue Agents Henry Miller and Charles D. Ford, their books, papers, records and other data bearing upon the examinations being conducted, and also provided these agents with the assistance of the Certified Public Accountant of Clifford O. Boren and Delta M. Boren to facilitate the examinations, and otherwise fully cooperated in the conduct of the examinations.

## III.

On May 11, 1954, petitioner Tucker was assigned to assist in the examination, pursuant to a request therefor made by Charles D. Ford on or about April 28, 1954.

## IV.

On September 8, 1954, Revenue Agent Ford contacted Delta M. Boren and at that time and on September 14, 1954 and September 28, 1954 [32] solicited employment by Clifford O. Boren, Delta M. Boren and Clifford O. Boren Contracting Co., Inc. of himself and his associates to represent



respondents in connection with their income taxes for 1950 and 1951, which representation would include the use of information which had been obtained in the conduct of the investigation by the Bureau. On October 6, 1954, respondents through their counsel reported the solicitations to authorities in the Bureau of Internal Revenue. On that date Revenue Agent Forrest P. Calkins was assigned to make a re-examination. Revenue Agent Charles D. Ford resigned from the service on or about September 10, 1954.

#### V.

Subsequent to October 6, 1954, respondents received information which indicated that there were, and now are, persons still in the Bureau of Internal Revenue who are connected with the investigation of this case, who have a close, personal relationship with Ford.

#### VI.

These matters are now being investigated by the Special Intelligence Unit of the Treasury Department and by the Inspection Service.

#### VII.

On October 20, 1954, petitioner Tucker and Revenue Agent Forrest P. Calkins appeared at the offices of respondents' attorneys and informed them that they had been assigned to complete the Boren audit for the years 1950 and 1951. Revenue Agent Calkins stated at that time that he wanted to start from "scratch", disregarding the examinations which had been in process about a full year.

## VIII.

Upon the commencement of the re-examination of the returns of Clifford O. Boren and Delta M. Boren for the calendar years 1950 and 1951 by petitioner Tucker and Calkins, they demanded that the corporation make available to them the books, papers, records and other data of the corporation for the fiscal year July 1, 1951 to April 30, 1952, to be used by them in the examination of the returns of Clifford O. Boren and Delta M. Boren for the years 1950-1951. Tucker and Calkins agreed to contemporaneously examine the said books and records for the dual purposes of ascertaining the tax liability of Clifford O. Boren and Delta M. Boren for the calendar years 1950-1951, and of ascertaining the [33] tax liability of the corporation for the fiscal year ended April 30, 1952. During the period October 18, 1954 and July 15, 1955, Tucker and Calkins examined the corporate books and records for these dual purposes. Throughout the examination the primary emphasis of Tucker and Calkins was the tax liability of Clifford O. Boren and Delta M. Boren for the years 1950 and 1951.

## IX.

In the conduct of the examination of the corporation's books and records by Tucker and Calkins, they had available for examination, and did examine, the general journal, cash journal, general ledger, payroll records, and all of the payroll checks of the corporation for the period July 1, 1951 to April 30, 1952. Calkins made extensive

notes and transcripts from said books and records, and the payroll checks and records. Tucker and Calkins examined the payroll records and checks and Tucker made abstracts of information from the payroll records and checks. These examinations were made in connection with the matter of the tax liability of Clifford O. Boren and Delta M. Boren for the calendar years 1950 and 1951.

### X.

Prior to July 11, 1955, Tucker and Calkins completed their examination of the payroll records and payroll checks and these records and checks were returned to the corporation. During the period between July 11, 1955 and July 15, 1955, Tucker and Calkins again demanded to examine said payroll records and payroll checks. In compliance with said demand, the corporation again delivered and made available to Tucker and Calkins the payroll records and checks.

### XI.

The previous examination of the records of the corporation in connection with the investigation of the tax liability of Clifford O. Boren and Delta M. Boren render further examinations of said records unnecessary and oppressive. Tucker and Calkins have extensively examined the payroll records and payroll checks of the corporation.

### XII.

The only books and records which petitioner wants to examine are the payroll checks of the

corporation signed by the persons named in [34] the summons for the period July 1, 1951 to December 31, 1951.

For a third and separate defense, respondents allege:

Tax Liability of Clifford O. Boren and Delta M. Boren for 1950 and 1951 Has been Determined.

### I.

Respondents refer to paragraphs I through XI, inclusive, of their second defense, and by said reference incorporate said paragraphs herein.

### II.

Under the provisions of Section 6501 of the Internal Revenue Code of 1954, any tax imposed by the Internal Revenue Code must be assessed within three years after the return was filed.

### III.

A joint income tax return of Clifford O. Boren and Delta M. Boren for the calendar year 1950 was made and filed on or prior to March 15, 1951. In the month of January, 1954, Clifford O. Boren and Delta M. Boren signed a waiver of the Statute of Limitations for the calendar year 1950, which waiver extended the time for assessment of a deficiency to June 30, 1955. The period within which the Commissioner of Internal Revenue could make a redetermination of the income tax liability of Clifford O. Boren and Delta M. Boren for the calendar year 1950 expired on June 30, 1955.

## IV.

Under date of March 11, 1955, the Commissioner issued his Notice of Deficiency to Clifford O. Boren and Delta M. Boren for the taxable year 1950.

## V.

On June 6, 1955, Clifford O. Boren and Delta M. Boren filed with the Tax Court of the United States a petition for redetermination of their tax liability for the taxable year 1950.

## VI.

Clifford O. Boren and Delta M. Boren, and each of them, made and filed income tax returns for the calendar year 1951 on or prior to March 15, 1952. The period within which the Commissioner of Internal Revenue could make a redetermination of the income tax liability of Clifford O. Boren and Delta M. Boren for the calendar year 1951 expired on March 15, 1955. [35]

## VII.

Under date of March 11, 1955, the Commissioner issued Notices of Deficiencies for Clifford O. Boren and Delta M. Boren For the taxable year 1951.

## VIII.

On or about July 22, 1955, the Commissioner assessed against Clifford O. Boren and Delta M. Boren the taxes, interest and penalties proposed to be assessed in said Notices of Deficiency. There are attached hereto marked Exhibit "A" and Exhibit



“B” true copies of the Statement of Income Tax Due for Clifford O. Boren and Delta M. Boren, showing said assessments. Delta M. Boren has paid the taxes, interest and penalties demanded in said statement.

For a fourth and separate defense, respondents allege:

Failure to Utilize prior opportunity.

### I.

Respondents refer to paragraphs I through XI, inclusive, of their second defense, and by said reference incorporate said paragraphs herein.

### II.

Petitioner Tucker had available to him throughout the course of the re-examination being made by petitioner and Calkins all of the books and records of Clifford O. Boren Contracting Co., Inc. now sought by petitioner Tucker in his summons. During this period Tucker spent less than five per cent of the time actually examining said books and records. More than 95% of Tucker's time was devoted to leisurely relaxing and enjoying the comforts afforded by the offices of counsel for respondents.

For a fifth and separate defense, respondents allege:

Examination Seeks Information for Criminal Prosecution and Not Ascertainment of Tax Liability.

## I.

Respondents refer to paragraphs I through XI, inclusive, of their second defense, and by said reference incorporate said paragraphs herein.

## II.

On July 20, 1955, petitioner Tucker demanded the re-examination of the payroll records and checks of the corporation. Said records and checks had been examined by both Tucker and [36] Calkins throughout the period of examination and had repeatedly been made available to Tucker and Calkins. At the time of this demand, Notices of Deficiency had been issued by the Commissioner for all respondents. Tucker acknowledged that he did not want to re-examine the records and checks for the purpose of adjusting or changing the Notice of Deficiency.

Respondents are informed and believe, and therefore state the fact to be, that the sole purpose of the re-examination sought by the summonses is to attempt to procure evidence for the purpose of a possible criminal prosecution against respondents.

### Notice of additional Inspection.

For a sixth and separate defense, respondents allege:

## I.

Respondents refer to paragraphs I through XI, inclusive, of their second defense and paragraphs I through VIII, inclusive, of their third defense,

and by said reference incorporate said paragraphs herein.

## II.

One examination of the books of account of the corporation has been made for the period July 1, 1951 to December 31, 1951 in connection with the matter of the income tax liability of Clifford O. Boren and Delta M. Boren for the calendar years 1950 and 1951. None of the respondents have requested a re-examination of the corporation's books of account. Neither the Secretary of the Treasury nor his delegate, after investigation, has notified the corporation in writing that an additional inspection is necessary. The examination sought by the summonses is unnecessary.

### Petitioner Lacks Authority.

For a seventh and separate defense, respondents allege:

## I.

Respondents refer to paragraphs I through XI, inclusive, of their second defense and paragraphs I through VIII, inclusive, of their third defense, and by said reference incorporate said paragraphs herein.

## II.

The factual basis upon which authority to issue summonses under [37] Section 7602 is premised does not exist for the summonses issued by Tucker. Clifford O. Boren and Delta M. Boren made timely returns for the calendar year 1951. The Commis-



sioner of Internal Revenue has heretofore ascertained the correctness of the returns filed by Clifford O. Boren and Delta M. Boren for said years. No question of liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or the collection of any internal revenue tax is involved.

### Records not Material.

For a eighth and separate defense, respondents allege:

#### I.

Respondents refer to paragraphs I through XI, inclusive, of their second defense, and by said reference incorporate said paragraphs herein.

#### II.

The books and records of the corporation for the period July 1, 1951 to December 31, 1951 demanded in said summonses are neither material nor relevant to the matter of the income tax liability of Clifford O. Boren and Delta M. Boren for the calendar year 1950.

### No Probable Cause.

For a ninth and separate defense, respondents allege:

#### I.

Respondents refer to paragraphs I through XI, inclusive, of their second defense, and by said reference incorporate said paragraphs herein.

## II.

Said summonses were not issued upon probable cause, supported by the oath or affirmation of petitioner or any other person.

## III.

No probable cause is shown by the petition.

Wherefore, your respondents pray that the petition be dismissed and for such other and further relief as to the Court may seem just and proper.

TORRANCE & WANSLEY

/s/ By JOHN A. BRANT

[38]

Duly Verified. [39]

[Endorsed]: Filed November 10, 1955.

TELEPHONE BELMONT 3-1111

1 "FORM 17A 1951 1  
Revised May 1953 Clifford O. Boren 2  
2 U.S. Treasury Department c/o Torrance & Wansley Your Copy  
Internal Revenue Service 1216 Bk of America Bldg  
3 San Diego Calif  
554-01-3699 27-1005740/52L  
4 7-510252/55L BK 536

	Reference and Date	Assessment	Amount Paid	Balance Due
5				
6	STATEMENT OF JUL 22 55		6,490.77	
7	INCOME TAX JUL 22 55 IN		1,305.62	
8	DUE JUL 22 55 P		3,245.39	11,041.78*

9 This bill for the amount shown as  
10 "Balance Due" is being sent to you in  
11 accordance with law. The law also  
12 requires that interest at 6 percent  
13 per year until date of payment be  
14 added unless this amount is paid  
15 within 10 days from date of this  
16 notice.

17 Amounts shown in "Assessment"  
18 above are for tax unless identified  
19 as penalty by letter "P" or interest  
20 by letter "I."

21 Keep this copy for your records. For  
22 prompt identification of your account and  
23 to insure proper credit please return Dis-  
24 trict Director's Copy with your remittance.

25 EXHIBIT "A"

26 "FORM 17A 1951 1  
Revised May 1953 Delta M. Boren 2  
27 U.S. Treasury Department c/o Torrance & Wansley Your Copy  
Internal Revenue Service 1216 Bank of America Bldg  
28 San Diego Calif  
567-26-0490 27-1005741/52L  
29 7-510253/55L BK 536

	Reference and Date	Assessment	Amount Paid	Balance Due
30				
31	STATEMENT OF JUL 22 55		6,490.77	
32	INCOME TAX JUL 22 55 IN		1,305.62	
33	DUE JUL 22 55 P		3,245.39	11,041.78*

34 This bill for the amount shown as  
35 "Balance Due" is being sent to you in  
36 accordance with law. The law also  
37 requires that interest at 6 percent  
38 per year until date of payment be  
39 added unless this amount is paid  
40 within 10 days from date of this  
41 notice.

42 Amounts shown in "Assessment"  
43 above are for tax unless identified as  
44 penalty by letter "P" or interest by  
45 letter "I."

46 Keep this copy for your records. For  
47 prompt identification of your account and  
48 to insure proper credit please return Dis-  
49 trict Director's Copy with your remittance.

50 EXHIBIT "B"



[Title of District Court and Cause.]

## AFFIDAVIT OF LLOYD M. TUCKER

United States of America,  
Southern District of California—ss.

Lloyd M. Tucker, being first duly sworn, deposes and says:

That affiant is now and has been for the last nine years a Special Agent of the Internal Service and for the four years last past has been assigned to the San Diego office of the Internal Revenue Service. That his duties primarily concern the investigation of alleged evasion of income taxes and matters related thereto in the enforcement of the Internal Revenue Laws.

That on October 20, 1954, in accordance with an official assignment of his office affiant commenced an investigation of the tax liability of Clifford O. Boren and Delta M. Boren for the years 1950 and 1951. During the course of the investigation affiant was informed that one of the persons carried as a salaried employee in the 1951 payroll account of the Clifford O. Boren Contracting Co., Inc., for convenience hereinafter referred to as the Company, was not [41] employed by the Company or Delta M. Boren or Clifford O. Boren; that said "employee" performed no service for the Company or said individuals in any respect and rarely appeared on the premises of the Company.

An examination of the payroll records of the com-

pany by this affiant and Internal Revenue Agent Forrest P. Calkins disclosed that the Company records carried said "employee" as a full time employee at 40 hours per week during the latter half of 1951.

Weekly payroll checks issued by the Company to said "employee" for the period June 29 to December 5, 1951, disclosed endorsements by said "employee" and Delta Boren.

This affiant and Agent Calkins examined a federal income tax return filed in the name of said "employee" for the calendar year 1951, which reported that said "employee" was paid the sum of \$2,853.03 from Clifford O. Boren and the sum of \$2,817.97 from the Company as salary or wages.

Said "employee" has denied under oath that she signed and filed or caused to be filed an income tax return for the year 1951 reporting said salary or wages from said sources and has denied working for either the Clifford O. Boren Construction Company, Inc. or Clifford O. Boren for more than 10 or 12 days in 1951.

From said "employee's" sworn denial it became apparent to your affiant that if the 1951 income tax return was filed and signed by someone other than said "employee", that it was probable that the purported endorsements of said "employee" on the payroll checks issued to said "employee" were placed there by some person other than said "employee".

Your affiant therefore deemed it essential to obtain photostatic or photographic copies of the pay-

roll checks issued to said "employee" for the purpose of having them analyzed by an expert document examiner to ascertain the true facts concerning the endorsements thereon. Accordingly, on July 13, 1955, he requested permission [42] from John A. Brant, who had custody of said checks at that time, to have them reproduced by means of photostating. Mr. Brant stated that affiant was not entitled to the checks and stated that he would not permit him to have photostats made of such checks.

If the purported endorsements of said "employee" were placed on the said payroll checks by Clifford O. Boren, Delta M. Boren, or by some other person who was under their direction and control, such acts could well result in an understatement of income on the 1951 corporation income tax return filed for the Clifford O. Boren Contracting Company, Inc., and in an understatement of net income on the part of the person or persons who received the use and benefits of the aforesaid payroll checks.

Affiant, in view of the above investigation, has reason to believe that other payroll records and checks of the Clifford O. Boren Contracting Co., Inc., may be erroneous or fraudulent in that other persons carried on the payroll records of the corporation are not bona fide employees and that either Delta M. Boren or Clifford O. Boren may have received the use and benefit of the amounts purportedly paid to other employees and may have failed to include said amounts in their own income tax returns.

/s/ LLOYD M. TUCKER



Subscribed and sworn to before me this 30th day of November, 1955.

[Seal]           /s/ JOHN A. CHILDRESS,  
Clerk United States District Court, Southern District of California. Signed by William W. Luddy, Deputy. [43]

Affidavit of Service by Mail attached. [44]

Petitioner's Exhibit No. 3.

[Endorsed]: Filed December 1, 1955.

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[Title of District Court and Cause.]

MEMORANDUM IN SUPPORT OF ORDERS  
TO SHOW CAUSE AND GOVERNMENT'S  
RIGHT TO COMPEL PRODUCTION OF  
CORPORATE BOOKS AND RECORDS  
AND TO COPY SAME AND IN OPPOSITION  
TO MOTION TO VACATE ORDERS  
TO SHOW CAUSE

Preliminary Statement

Special Agent Lloyd M. Tucker filed this action to enforce Internal Revenue Service summonses on September 19, 1955. On that date a hearing was held in the Southern Division, San Diego, before the Honorable Harry C. Westover, District Judge, at which hearing John Brant, counsel for the respondents, was present in connection with a motion for preliminary injunction in action No. 1774-SD, Clifford O. Boren Contracting Co., Inc., Clifford O.

Boren and Delta M. Boren vs. Lloyd M. Tucker. The result of the hearing in No. 1774-SD was that counsel stipulated that proceedings in said matter go off calendar pending final determination of No. 1780-SD.

### Statement of Facts

In action No. 1774-SD, there was filed on September 19, 1955, an affidavit of Lloyd M. Tucker in opposition to plaintiffs' motion for preliminary injunction which affidavit petitioner incorporates [53] herein by reference. In addition, in this action, Lloyd M. Tucker verified the petition and filed a further affidavit on December 1, 1955.

In brief, Lloyd M. Tucker has been conducting and is continuing an investigation of the tax liability of Clifford O. Boren and Delta M. Boren for the years 1950 and 1951. Agent Tucker has reasonable grounds to believe that the taxpayers failed to report in excess of \$40,000.00 of taxable income and that it was done with the intent to evade and defeat the payment of taxpayers' income taxes.

In particular, certain payroll records and checks issued to persons carried on the books of the Clifford O. Boren Contracting Co., Inc., appeared to have been falsified. Respondents, in their capacities as officers of the corporation, have refused to produce the payroll records and checks to permit the examination and copying of same by Agent Tucker. Photostating or copying of the checks and the endorsements thereon is necessary to determine whether there has been forced endorsements and the

receipt of the funds by either Clifford O. Boren or Delta M. Boren.

On September 6, 1955, Clifford O. Boren and Delta M. Boren as officers of the Clifford O. Boren Contracting Co., Inc., appeared in response to Special Agent Tucker's summonses served upon them but refused to produce the books and records of the corporation. [Exhibit D to the petition.]

### Question Presented

Whether Clifford O. Boren and Delta M. Boren as officers of the Clifford O. Boren Contracting Co., Inc., should be compelled to produce the books, records, payroll records and checks summoned for the examination by Special Agent Tucker for photographing or copying.

### Argument

The Government in an investigation to determine the tax liability has the right, through its agents, to issue summonses to [54] third parties to compel them to produce books and records and to testify concerning the books or records. Internal Revenue Code of 1954, §7602, 7603; *Chapman vs. Goodman*, 219 Fed. 2d 802 (9 Cir. 1955); *Tucker vs. Hubner*, 129 Fed. Supp. 110 (S.D. Cal. 1955), on appeal to 9 Cir., Docket No. 14704; *United States vs. People's Deposit Bank, et al.*, 112 Fed. Supp. 720 (E.D. Ky. 1953), *Affm'd*, 212 Fed. 2d 86 (6 Cir. 1954), *Cert. Denied*, 348 U.S. 838.

In the course of an investigation, Government agents may prepare copies or facsimiles of documents rightfully in their possession and such copies,

facsimiles or photostats may be admitted in evidence in any subsequent trial where the original documents are for some reason not available. *Lisansky vs. United States*, 31 Fed. 2d 846 (4 Cir., 1929), Cert. denied, 279 U.S. 873; *Cooper vs. United States*, 9 Fed. 2d 216 (8 Cir., 1925).

In fact, for the orderly transactions of business, it is preferable that copies or photostats be placed in evidence rather than the original records. This enables business houses, banks, etc., to continue in possession of their records for which they may have a continuing need while still permitting the Court to have exact copies of the records in evidence. Here, it is to the corporation's advantage that photostating or photographing the checks be done, since otherwise the records will have to be retained by the Government for an extended period of time to permit an expert document examiner to analyze them.

The respondents allege in an answer filed herein and in other memoranda and affidavits filed in action No. 1774-SD, that the agents have had sufficient opportunity to and have, in fact, inspected the books and records of the corporation and that any further inspection would amount to a "fishing expedition" and an unreasonable search and seizure, and an undue burden on the respondents. These contentions are rebutted by the affidavits of Special Agent Lloyd M. Tucker filed September 19, 1955, in action No. 1774-SD and his affidavit of [55] December 1, 1955, filed in action No. 1780-SD, which affidavits indicate that the agents were not given

sufficient opportunity to properly examine the books and records of the corporation. The affidavits further indicate that the investigation of the tax liability involving Clifford O. Boren and Delta M. Boren is still continuing, and that further access to the books and records of Clifford O. Boren Contracting Co., Inc., is necessary to the investigation. In the latest affidavit, the real dispute between the parties is clarified. Special Agent Tucker desires to photostat or photograph certain payroll checks and examine further the payroll records. This is the real issue between the parties.

### Conclusion

It is respectfully submitted that under the broad powers contained in §§7602, 7603 and 7604 of the Internal Revenue Code of 1954, the Government, through its special agents, has a right to examine and, if necessary, photograph or photostat the records of the third person, the corporation.

Therefore, the Court should compel Clifford O. Boren and Delta M. Boren to produce the records or stand committed for contempt.

Respectfully submitted,

LAUGHLIN E. WATERS,

United States Attorney

EDWARD R. McHALE,

Asst. U. S. Attorney, Chief, Tax  
Division

ROBERT H. WYSHAK and

BRUCE I. HOCHMAN,



HARRY D. STEWARD and  
HOWARD HARRIS,

Asst. U. S. Attorneys

/s/ By EDWARD R. McHALE,

Attorneys for Petitioner [56]

Affidavit of Service by Mail attached. [57]

[Endorsed]: Filed December 2, 1955.

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[Title of District Court and Cause.]

AFFIDAVIT OF JOHN A. BRANT

United States District Court

For the Southern District of California—ss.

John A. Brant, being first duly sworn, deposes and says:

Your affiant is an attorney at law and one of the attorneys for the respondents. Petitioner Lloyd M. Tucker and Revenue Agent Forrest P. Calkins first appeared in my office on October 20, 1954. On that date they informed your affiant that they had been assigned to complete the audit of the returns of Clifford O. Boren and Delta M. Boren for the calendar years 1950 and 1951. Revenue Agent Forrest P. Calkins stated that he wanted to start the examination from "scratch." Petitioner Tucker and Revenue Agent Calkins informed your affiant at that time that they intended to conduct a criminal investigation of Clifford O. Boren and Delta M. Boren for these years.

Petitioner Tucker and Revenue Agent Calkins

appeared at the office of your affiant for the purpose of conducting their examination on the following [58] dates and devoted the amount of time shown in making their investigation and examining the books and records of respondent Clifford O. Boren Contracting Co., Inc.

October 22, 1954: One hour.

November 4, 1954: One hour.

December 7, 1954: One hour.

December 15, 1954: Four and one-half hours.

December 16, 1954: Three hours.

December 30, 1954: One-half hour.

January 19, 1955: Five and one-half hours.

January 20, 1955: One hour.

February 11, 1955: Four hours.

July 11, 1955: Two and one-half hours.

July 13, 1955: Six hours.

July 14, 1955: Three and one-half hours.

July 15, 1955: Three hours.

During the course of the examination petitioner and Revenue Agent Calkins requested that the payroll records and checks of respondent corporation for the fiscal year July 1, 1951 to April 30, 1952 be made available to them. Your affiant obtained these records and delivered them to petitioner and Calkins. Both petitioner and Calkins examined these records in detail. These records and checks remained available for examination until they informed your affiant that they were finished with them. On July 11, 1955 petitioner and Calkins again requested the payroll records and payroll checks and they were



again delivered to them on July 13, 1955 for examination.

During the examination by petitioner Tucker and Mr. Calkins, petitioner spent only a small percentage of his time actually examining the available books and records. Most of his time was spent relaxing while Mr. Calkins worked. One of the few occasions when petitioner Tucker did examine the available records was when he examined the payroll records and checks.

In a letter written to your affiant dated October 19, 1955, Edward R. McHale, Esquire, Assistant United States Attorney, and attorney for petitioner Tucker, admitted that the payroll checks of respondent corporation are the only [59] documents which petitioner wants to examine.

The examination of the books and records by petitioner Tucker and Revenue Agent Calkins was for the primary purpose of investigating the tax liability of Clifford O. Boren and Delta M. Boren for the calendar years 1950 and 1951, and for the incidental purpose of investigating the tax liability of respondent corporation for the fiscal year July 1, 1951 to April 30, 1952.

Your affiant has examined a copy of the employee's affidavit referred to in the affidavit filed herein by Lloyd M. Tucker and said affidavit recites that it was signed by the employee on March 16, 1955.

Your affiant has examined the notices of defici-

ency issued by the Commissioner of Internal Revenue to respondent corporation under date of July 15, 1955 for the fiscal year July 1, 1951 to April 30, 1952. Said notice of deficiency disallows as a deduction salaries and wages in the amount of \$2,-817.97.

Your affiant has also examined the notices of deficiency issued by the Commissioner of Internal Revenue to respondents Clifford O. Boren and Delta M. Boren under date of March 11, 1955 for the calendar years 1950 and 1951. The notice of deficiency for the year 1950 disallows as a deduction salaries and wages in the amount of \$8,911.93. The notice of deficiency for the year 1951 disallows as a deduction salaries and wages in the amount of \$4,-353.03.

Your affiant is informed and believes, and therefore states the fact to be, that included within these disallowed deductions are the salaries and wages referred to on page two of the affidavit of Lloyd M. Tucker.

In each of the notices of deficiency referred to hereinabove, the Commissioner of Internal Revenue has asserted a 50% penalty purportedly in accordance with the provisions of Section 293 (b) of the Internal Revenue Code of 1939.

On July 20, 1955, petitioner Tucker stated to your affiant that he did not want to re-examine the payroll checks of respondent corporation for the purpose of changing the notice of deficiency issued to it.

/s/ JOHN A. BRANT

Subscribed and sworn to before me this 5th day of December, 1955.

[Seal]        /s/ MARY JOAN TRUEBLOOD,  
Notary Public in and for the County of San Diego,  
State of California. [60]

Respondents' Exhibit "B".

[Endorsed]: Filed December 5, 1955.

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[Title of District Court and Cause.]

### MINUTES OF THE COURT

Date: Dec. 5, 1955, at San Diego, Calif.

Present: Hon. Wm. C. Mathes, District Judge;  
Deputy Clerk: P. D. Hooser; Reporter: Don P.  
Cram; Counsel for Plaintiff: Edw. R. McHale,  
Asst. U. S. Attorney.

Proceedings: For hearing (1) motion of respondents, filed Oct. 5, 1955, to vacate order to show cause, and (2) order to show cause, filed Sept. 30, 1955, as to Clifford O. Boren and Delta M. Boren why an attachment should not issue against them, etc.

It Is Ordered that motion (1) is granted in part and denied in part; Attorney Brant to prepare and settle in five days order.

Attorney Brant makes a statement asking to be relieved as counsel, but upon further consideration, and upon a statement by Attorney McHale, and with permission of the Court, states he will continue to act as attorney.

Affidavit of Lloyd M. Tucker, filed in Case No. 1774-SD Civil, Sept. 10, 1955, Affidavit of Lloyd M. Tucker, filed in Case No. 1780-SD Civil, Dec. 1, 1955, and Petition filed in Case No. 1780-SD Civil, Sept. 19, 1955, are incorporated by reference and received as pro tanto the direct examination of the petitioners.

Court recesses. At 3:35 p.m. court reconvenes herein.

Attorney McHale makes a statement. Petitioner's Exhibits 1, 2, and 3 are received in evidence, and received as pro tanto the direct examination of the petitioners. Respondents' Exhibits A and B are received in evidence.

Petitioner rests. Lloyd M. Tucker and Forrest P. Calkins, respectively, are called, sworn, and testify on direct examination by Attorney Brant.

Respondents' Exhibit C is received in evidence.

Respondents rest. Petitioner rests. Attorney Brant argues; at 5:10 p.m. Attorney McHale argues, and at 5:25 p.m. Attorney Brant argues.

The motion of the petitioner to strike the second and ninth separate defenses in respondents' answer to the petition is granted, and otherwise the motion to strike is denied. The separate defenses which stand are not sustained. The petition is sustained. The prayer of Paragraph 4 in the Court's opinion is sufficient in asking further relief to warrant the order with respect to copying or photographing. The petition is granted to the extent that the respondents are ordered to appear and give testimony in response thereto and to produce the documents therein

set forth in the summonses, Exhibits A, B, and C to the petition.

Respondents are ordered to appear at 3755 6th Avenue, San Diego, at 10 o'clock on the morning of December 7, 1955, and produce the records called for in the summonses and then and there give testimony with respect thereto as required by the summonses and in the event they fail so to do or give the testimony required of them at that time they are to appear before this court on December 13th, next, at 10 a.m. and then and there show cause, if any they have, why they and each of them should not be held in civil contempt of this Court and penalties assessed accordingly. The Government will prepare and settle under local rule 7 within three days Findings of Fact, Conclusions of Law and Order accordingly. This order is now amended to the extent that the Government will prepare and settle Findings, Conclusions and Order by tomorrow, December 6, 1955, and the respondents to appear and produce by 10 a.m. December 8, 1955.

The Court Finds it is a continuing examination and a further examination necessary to the examination being made to determine the question of whether or not there has been fraud in connection with the returns, as well as criminal prosecution, but the statutory basis for the examination is the open issue as to fraud liability. The fact that the information may be used in criminal prosecution the Court deems immaterial.

JOHN A. CHILDRESS,  
Clerk

[61]



[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

On Monday, December 5, 1955, at 2 o'clock p.m., there regularly came on for hearing in this cause, in the Southern Division of this Court, sitting in San Diego, without a jury, the Honorable Wm. C. Mathes, United States District Judge, presiding, two orders directed to Clifford O. Boren, President, Clifford O. Boren Contracting Co., Inc., and Delta M. Boren, Vice President, Clifford O. Boren Contracting Co., Inc., to show cause, if any there be, why each of them should not be compelled to answer petitioner's questions and produce books, records, papers, and data, and in the event their failure so to do, why they and each of them should not be held in civil contempt; the petitioner, Lloyd M. Tucker, represented by his attorneys, Laughlin E. Waters, United States Attorney, and Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, and the respondents, Clifford O. Boren, President, Clifford O. Boren Contracting Co., Inc., [62] Delta M. Boren, Vice President, Clifford O. Boren Contracting Co., Inc., and the Clifford O. Boren Contracting Co., Inc., represented by their attorneys Torrance & Wansley by John A. Brant and Albert W. Strang; and the petitioner having moved to strike all separate defenses raised in the answer, and the Court having granted the motion with respect to defenses two and nine, and having denied the motion with re-



spect to the other defenses; and the Court having heard the testimony, and having duly considered the same and the briefs and the oral arguments of counsel, now finds as follows:

### Findings of Fact

#### I.

This action arises and jurisdiction is granted this Court under the provisions of the Internal Revenue Code of 1954, 68A Stat., Sections 7402, 7602, 7603, 7604, 7605; Federal Rules of Civil Procedure 64, 81(a)(3); and Title 28 United States Code, Sections 1340 and 1345.

#### II.

That petitioner, Lloyd M. Tucker, is a duly appointed and acting Special Agent of the Internal Revenue Service and has been authorized by the Secretary of the Treasury to perform the duties of such office and, specifically, the duties referred to in Sections 7603 and 7604 of the Internal Revenue Code, 1954.

#### III.

The respondent Clifford O. Boren Contracting Co., Inc., is a corporation duly organized and existing under the laws of the State of California and has its principal office in the City of San Diego, California.

#### IV.

Respondent Clifford O. Boren Contracting Co., Inc., and respondent Clifford O. Boren, its President, and respondent Delta M. Boren, its Vice-President, in their capacities as such, have possession, care, and custody of certain books, records,

papers and data hereinafter set forth; said books, records, papers and data contain therein entries relating to the business of the aforesaid Clifford O. Boren and Delta M. Boren; said books, records, papers and data are material and relevant to said inquiry. [63]

#### V.

Said books, records, papers and data are as follows: General Journal, Cash Journal, General Ledger, Payroll Records and Payroll Checks bearing the endorsement of any of the following named persons: Clifford O. Boren, Delta M. Boren, Marjorie H. Bell, Betty K. McCarthy, and the Clifford O. Boren Contracting Company, Inc., for the period from July 1, 1951 to December 31, 1951.

#### VI.

Commencing November 2, 1953, the Internal Revenue tax liability of Clifford O. Boren and Delta M. Boren for the calendar years 1950 and 1951 was continuously, and now is, under inquiry and determination by the Internal Revenue Service; the petitioner has reasonable cause to believe that Clifford O. Boren and Delta M. Boren may have filed false or fraudulent returns with intent to evade the tax or may have willfully attempted to defeat or evade the taxes imposed by the Internal Revenue Code.

#### VII.

Preliminary investigation of the taxable years 1950 and 1951 of the Borens led petitioner to believe that an amount in excess of \$40,000.00 of taxable income was not reported by the Borens as

required by law. Petitioner could discover no evidence tending to show that this non-disclosure was due to mistake, inadvertence or other justifiable or legal reason, or tending to show that it was not done with the purpose and intent to evade and defeat the payment of the taxpayers' income taxes.

### VIII.

The petitioner, Tucker, was assigned to cooperate in the examination of the tax liability of the Borens for the years 1950 and 1951 on or about May 11, 1954. On or about December 7, 1954, petitioner, Tucker, and Revenue Agent Calkins commenced an examination of returns of Clifford O. Boren and Delta M. Boren for the calendar years 1950 and 1951, and on or about that date demanded that the corporation make available to them the books, papers, records and other data of the corporation for the fiscal year July 1, 1951 to April 30, 1952, to be used by them in the examination of the returns of Clifford O. Boren and Delta M. Boren for the years 1950 and 1951. From time to time during the period December 7, 1954 to July 15, 1955, Tucker and Calkins examined the corporate books and records for the purpose of ascertaining tax liability of Clifford O. Boren and Delta M. Boren for the calendar years 1950 and 1951, and for the purpose of ascertaining tax liability of the corporation for the fiscal year ending April 30, 1952. In the conduct of the examination of the corporation's books and records by Tucker and Calkins, they had available for examination, and did examine, the

general journal, cash journal, general ledger, payroll records, and all of the payroll checks of the corporation for the period July 1, 1951 to April 30, 1952. Calkins made extensive notes and transcripts from said books and records, and the payroll checks and records. Tucker and Calkins examined the payroll records and checks and Tucker made abstracts of information from the payroll records and checks. These examinations were made in connection with the matter of the tax liability of Clifford O. Boren and Delta M. Boren for the calendar years 1950 and 1951, and the tax liability of the corporation.

### IX.

During the course of the investigation, and some time in March, 1955, Special Agent Tucker was informed that one of the persons carried on the payroll of the Clifford O. Boren Contracting Co., Inc., as an employee, and with respect to whom the payroll records indicated weekly payroll checks issued during the period June 29, 1951 to December 5, 1951, was not an employee of the corporation during that time and did not receive the wages shown as paid to her in the company's books and records. The petitioner caused a further investigation to be made and said "employee" denied under oath that she was paid the sum of \$2853.03 from Clifford O. Boren, and the sum of \$2817.97 from the corporation as salary or wages, or that she signed and filed, or caused to be filed, an income tax return for the year 1951 reporting said salary or wages from said sources, and further denied that

she was a full time employee and had worked for either Clifford O. Boren or the said Clifford O. Boren Construction Co., Inc., for more than ten or twelve days in 1951.

## X.

The petitioner, Tucker, had reasonable cause to believe that several salary checks of the Clifford O. Boren Contracting Co., Inc., bearing endorsements of at least one employee and of [65] Delta M. Boren were not endorsed by said employee and that said employee was not a bona-fide employee, and that either Delta M. Boren or Clifford O. Boren, or both of them may have received the use and benefit of the amounts purportedly paid to other employees and may have failed to include said amounts in their own income tax returns for the years 1950 and 1951.

## XI.

On August 25, 1955, summonses were issued by petitioner to the respondents Clifford O. Boren Contracting Co., Inc., to Clifford O. Boren as President of Clifford O. Boren Contracting Co., Inc., and to Delta M. Boren as Vice President of Clifford O. Boren Contracting Co., Inc., to appear before petitioner at 3755 Sixth Avenue, San Diego, California, on September 6, 1955, at 10:00 a.m., and there to testify and to produce among other documents said books, records, papers and data.



## XII.

On August 25, 1955, at San Diego, California, summonses issued to Clifford O. Boren Contracting Co., Inc., and Clifford O. Boren, President, Clifford O. Boren Contracting Co., Inc., were personally served by delivering in hand to Clifford O. Boren attested copies thereof; on August 25, 1955, at San Diego, California, the summons issued to Delta M. Boren, Vice President, Clifford O. Boren Contracting Co., Inc., was served by leaving an attested copy with one Thelma Wertheimer, housekeeper for Delta M. Boren, at 4511 Utah Street, San Diego, California, the last and usual place of abode of Delta M. Boren.

## XIII

Respondents Clifford O. Boren, President of the Clifford O. Boren Contracting Co., Inc., and Delta M. Boren, Vice President of the Clifford Boren Contracting Company, Inc., reside in San Diego County within the Southern District of California.

## XIV.

At the time and place set for hearing on the summonses served upon said respondents, there appeared Delta M. Boren, Clifford O. Boren, and John A. Brant, their attorney. The Borens brought with them to the hearing certain books, records, and papers of Clifford O. Boren Contracting Co., Inc., kept by Delta M. Boren, as Vice President, and Clifford O. Boren, as President of said corporation. Upon demand [66] by petitioner Tucker



to examine the records, the respondents Clifford O. Boren, President, Clifford O. Boren Contracting Co., Inc., and Delta M. Boren, Vice President, Clifford O. Boren Contracting Co., Inc., refused to produce said records.

### XV.

Respondents Delta M. Boren as Vice President of the Clifford O. Boren Contracting Co., Inc., and Clifford O. Boren as President of the Clifford O. Boren Contracting Co., Inc., and the Clifford O. Boren Contracting Co., Inc., did each wilfully and knowingly neglect and refuse to obey said summonses as required in that said respondents did appear at the time and place set forth in the summonses but did not produce said books, records, papers and data.

As Additional Findings with Respect to the Third and Separate Defense.

### XVI.

A joint income tax return of Clifford O. Boren and Delta M. Boren for the calendar year 1950 was made and filed on or prior to March 15, 1951. In the month of January, 1954, Clifford O. Boren and Delta M. Boren signed a waiver of the Statute of Limitations for the calendar year 1950, which waiver extended the time for assessment of a deficiency to June 30, 1955. Under date of March 11, 1955, the Commissioner issued his Notice of Deficiency of taxes, fraud penalties and interest, to Clifford O. Boren and Delta M. Boren for the tax-

able year 1950. On June 6, 1955, Clifford O. Boren and Delta M. Boren filed with the Tax Court of the United States a petition for re-determination of their tax liability for the taxable year 1950. Clifford O. Boren and Delta M. Boren, and each of them, made and filed income tax returns for the calendar year 1951 on or prior to March 15, 1952.

### XVII.

Under date of March 11, 1955, the Commissioner issued Notices of Deficiencies for Clifford O. Boren and Delta M. Boren for the taxable year 1951. On or about July 22, 1955, the Commissioner assessed against Clifford O. Boren and Delta M. Boren the taxes, interest and fraud penalties proposed to be assessed in said Notices of Deficiency. Delta M. Boren has paid the taxes, interest and penalties demanded in said statement. [67]

### XVIII.

The tax liability of Delta M. Boren and Clifford O. Boren for the calendar years 1950 and 1951 with respect to fraudulent omissions of income has not been finally determined and their criminal liability has not been finally determined with respect to said years.

As Additional Findings With Respect to the Fourth and Separate Defense.

### XIX.

Petitioner Tucker has never had exclusive pos-

session or control of the books, records, papers, payroll checks of the Clifford O. Boren Contracting Co., Inc., since the commencement of this examination; said petitioner has been permitted to examine them only in the presence and in the offices of the respondents' counsel and has been denied permission to make photostatic or photographic copies of any of said books, records, papers, checks, etc.

## XX.

Petitioner Tucker in connection with this continuing examination of the tax liability of Clifford O. Boren and Delta M. Boren for the taxable years 1950 and 1951, and in order to determine the truth or falsity of the payroll records and checks, needs to have photographic or photostatic copies made of the endorsements on said checks, and to investigate further all payroll checks bearing the endorsements of either of the respondents. Respondents have denied, and are continuing to deny, petitioner Tucker this examination.

As Additional Findings With Respect to the Fifth and Separate Defense.

## XXI.

On July 20, 1955, petitioner Tucker demanded examination of the payroll records and checks of the corporation. Said records and checks had been examined by both Tucker and Calkins throughout the period of examination and had repeatedly been made available to Tucker and Calkins. At the time

of this demand, Notices of Deficiency had been issued by the Commissioner for all respondents. Tucker acknowledged that he did not want to examine the records and checks for the purpose of adjusting or changing the Notice of Deficiency. [68]

## XXII.

The purpose of Tucker's examination was to determine the correctness of the tax returns filed by the Borens with respect to possible assertion of additional assessments by reason of fraud and fraud penalty assessments and with respect to possible criminal tax liability of the Borens.

As Additional Findings With Respect to the Sixth and Separate Defense.

## XXIII.

The tax investigation of the Borens commenced in November, 1953 and continued without interruption or termination since that date, and is still continuing.

None of the respondents has requested a re-examination of the corporation's books of account. Neither the Secretary of the Treasury, nor his delegate, after investigation, has notified the corporation in writing that an additional examination is necessary.

## XXIV.

The Petitioner Tucker has been engaged in examining the books and records of the Clifford O. Boren Contracting Co., Inc., with respect to the

tax liability of Delta M. Boren and Clifford O. Boren for the years 1950 and 1951, continuously since December 7, 1954.

As Additional Findings With Respect to the Seventh and Separate Defense.

### XXV.

The petitioner, Lloyd M. Tucker, is a Special Agent of the Internal Revenue Service, duly authorized and assigned to investigate the tax liability of the respondents, and has reasonable grounds to believe that the tax returns filed by the respondents for 1950 and 1951 are not correct, and that in consequence the respondents have additional liabilities with respect to civil fraud and may be liable under the criminal laws of the United States for filing false or fraudulent returns. [69]

As Additional Findings With Respect to the Eighth and Separate Defense.

### XXVI.

The books, records and papers of the Clifford O. Boren Contracting Company, Inc., for the period July 1, 1951 to December 31, 1951, demanded in summonses to-wit: General Journal, Cash Journal, General Ledger, Payroll Records and Payroll Checks bearing the endorsement of any of the following persons: Clifford O. Boren, Delta M. Boren, Marjorie H. Bell, Betty K. McCarthy, and the Clifford O. Boren Contracting Co., Inc., are ma-



terial and relevant to the matter of the income tax liability of Clifford O. Boren and Delta M. Boren for the calendar year 1951.

## XXVII.

Respondents having failed to sustain any of their separate defenses, and from the foregoing findings, the Court concludes as follows:

### Conclusions of Law

#### I.

The Court has jurisdiction of this action and of the parties hereto.

#### II.

The petitioner is duly authorized to conduct and is conducting a continuing investigation into the tax liability of Delta M. Boren and Clifford O. Boren with respect to the taxable years 1950 and 1951, and in connection therewith is entitled to examine the books, records, papers, and other documents specified by him in the summonses issued under the Internal Revenue laws by authority of the Secretary of the Treasury or his delegate, to the respondents.

#### III.

The respondents Delta M. Boren, Vice-President, Clifford O. Boren Contracting Co., Inc., Clifford O. Boren, President, Clifford O. Boren Contracting Co., Inc., in their capacities as officers of said corporation, have custody and control of the books, records, papers and other documents sought to be examined by the petitioner, and each of them did



willfully and knowingly refuse and neglect to obey the summonses served upon them, in that said respondents did appear at the time and place set forth in the summonses but refused to produce the books, [70] records, papers and payroll records, etc. demanded.

#### IV.

The petitioner Tucker has reasonable cause to believe that the respondents Delta M. Boren and Clifford O. Boren may have filed false or fraudulent returns of income taxes for the years 1950 and 1951, with intent to evade the taxes or may have willfully attempted to defeat or evade the taxes imposed by the Internal Revenue Code.

#### V.

Petitioner Tucker has reasonable cause to believe that certain payroll records and checks of the Clifford O. Boren Contracting Company, Inc. were falsified or forged, and that either Delta M. Boren or Clifford O. Boren, or both of them, may have received the use and benefit of the amounts purportedly paid by the corporation to employees and may have failed to include said amounts in their own income tax returns.

#### VI.

Petitioner Tucker is entitled to examine the books, records, papers and payroll checks of the Clifford O. Boren Contracting Co., Inc., set forth in the summonses issued by him, and to photograph or photostat the books, records, papers, and payroll

checks, and any portion thereof that he deems necessary and proper.

## VII.

Respondents having failed to sustain any of their separate defenses, the petitioner is entitled to the entry of an order of this Court directing the respondents Clifford O. Boren, President, Clifford O. Boren Contracting Co., Inc., and Delta M. Boren, Vice President, Clifford O. Boren Contracting Co., Inc., to appear before him and produce the following records: General Journal, Cash Journal, General Ledger, Payroll Records and Payroll Checks bearing the endorsement of any of the following named persons: Clifford O. Boren, Delta M. Boren, Marjorie H. Bell, Betty K. McCarthy, and the Clifford O. Boren Contracting Company, Inc., for the period from July 1, 1951 to December 31, 1951, on Thursday, December 8, 1955, at 10 o'clock a.m. at 3755 Sixth Avenue, San Diego, California; and in the event of their failure so to comply, they are ordered to be and appear before this Court at 10 o'clock a.m. Tuesday, December 13, 1955, in the Southern Division at San Diego, California, [71] to show cause why they and each of them should not be held in civil contempt for failure so to comply.

Dated this 7th day of December, 1955.

/s/ WM. C. MATHES

United States District Judge

**ORDER**

It is hereby ordered, adjudged, and decreed that respondents, Clifford O. Boren, President, Clifford O. Boren Contracting Co., Inc., and Delta M. Boren, Vice President, Clifford O. Boren Contracting Co., Inc., and the Clifford O. Boren Contracting Co., Inc., appear before Special Agent Lloyd M. Tucker on Thursday, December 8, 1955, at 10 o'clock a.m., at 3755 Sixth Avenue, San Diego, California, and produce, for examination, copying and photostating, the records called for in the summonses attached to the petition herein and heretofore served upon them, and then and there give testimony with respect thereto as required by the summonses, and in the event they fail so to do, or to give the testimony so required at that time, they are to be and appear before this Court on December 13, 1955, at 10 o'clock a.m. in the Southern Division, at San Diego, and then and there show cause, if any they have, why they and each of them should not be held in civil contempt of this Court and penalties assessed accordingly.

Dated this 7th day of December, 1955.

/s/ WM. C. MATHES

United States District Judge

Approved as to form this 6th day of December, 1955, pursuant to Local Rule 7(a).

**TORRANCE & WANSLEY**

/s/ By JOHN A. BRANT

[72]

[Endorsed]: Filed December 7, 1955.

[Title of District Court and Cause.]

MOTION FOR WRIT OF SUPERSEDEAS  
PENDING APPEAL

To: Lloyd M. Tucker, and Laughlin E. Waters,  
United States Attorney, and Edward R. Mc-  
Hale, Assistant United States Attorney, his  
attorneys:

Please Take Notice that on Wednesday, the 7th day of December, 1955, at 2:00 o'clock p.m., or as soon thereafter as counsel can be heard, respondents, and each of them, will move the above-entitled Court for a stay of the judgment made and entered in the above-entitled action pending the appeal of said judgment to the United States Court of Appeals for the Ninth Circuit, and to fix and determine the amount of a supersedeas bond to be filed by the respondents for the satisfaction of the costs and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such costs and damages as said Court of Appeals may award.

Said motion will be made on the ground that unless said judgment is stayed pending appeal respondents' appeal therefrom would be ineffective and respondents would be irreparably damaged.

Said motion will be based upon this notice of motion, the records and files in this action, and the Memorandum of Points and Authorities attached hereto.

Dated: December 7, 1955.

TORRANCE & WANSLEY,  
/s/ By JOHN A. BRANT,  
Attorney for Respondents [74]

[Endorsed]: Filed December 7, 1955.

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[Title of District Court and Cause.]

### MINUTES OF THE COURT

Date: Dec. 7, 1955, at Los Angeles, Calif.

Present: Hon. Wm. C. Mathes, District Judge;  
Deputy Clerk: P. D. Hooser; Reporter: Don P.  
Cram; Counsel for Petitioner: E. R. McHale;  
Counsel for Respondents: John A. Brant.

Proceedings: Attorney Brant states respondents intend to file notice of appeal and moves for a stay of execution pending appeal of order filed this date.

Attorney McHale opposes motion on grounds it is not a final and appealable order.

Attorney Brant makes a further statement in support of motion.

Court makes a statement.

Motion for stay as to existing order is denied; Attorney McHale to prepare and settle in three days order denying.

JOHN A. CHILDRESS,  
Clerk [76]

[Title of District Court and Cause.]

## ORDER

Respondents' Motion to Vacate the Order to Show Cause issued out of this Court on September 19, 1955, came on regularly for hearing on December 5, 1955, Laughlin E. Waters, United States Attorney, and Edward R. McHale, Assistant United States Attorney, appearing for petitioner, and John A. Brant, appearing for respondents, and the Court after considering the petition on file herein, and the arguments of counsel, and good cause appearing therefor,

It Is Hereby Ordered, Adjudged and Decreed that the portions of said Orders to Show Cause which require the respondents, and each of them, to show cause, if any there be, why an attachment should not issue against the respondents as for a contempt, are vacated and set aside. The remaining portions of said Orders to Show Cause shall remain in effect.

Done in Open Court December 5, 1955.

/s/ WM. C. MATHES,

U. S. District Judge [77]

Approved as to form:

Laughlin E. Waters, United States Attorney

Edward R. McHale, Asst. U. S. Attorney

/s/ Edward R. McHale,

Attorneys for Petitioner [78]

[Endorsed]: Filed December 7, 1955.



[Title of District Court and Cause.]

ORDER DENYING STAY OF JUDGMENT  
AND WRIT OF SUPERSEDEAS

The above matter came on for hearing on Wednesday, December 7, 1955, at 2:00 o'clock p.m., before the Court, the Honorable Wm. C. Mathes, United States District Judge presiding, the parties represented by their respective counsel of record, John A. Brant for the respondents and movants, and Laughlin E. Waters, United States Attorney, and Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, attorneys for Lloyd M. Tucker, on the motions of respondents for a stay of judgment made and entered in this action, and to fix and determine the amount of a supersedeas bond to be filed by respondents, and the Court having considered the file, the arguments of the parties, and it appearing to the Court that [79] the order made and filed the 7th day of December, 1955, with respect to which movants intend to file a notice of appeal is not a final and appealable order, now

It Is Hereby Ordered, Adjudged and Decreed that the motion of Clifford O. Boren Contracting Co., Inc., Clifford O. Boren and Delta M. Boren for a stay of judgment made and filed this day, and for stay of execution of such judgment, and to fix and determine the amount of a supersedeas bond on appeal be, and is, denied.

Done in Open Court December 7, 1955.

/s/ WM. C. MATHES,  
U. S. District Judge

Approved as to Form pursuant to Local Rule 7(a) this 8th day of December, 1955.

TORRANCE A. WANSLEY,  
/s/ By JOHN A. BRANT [80]

Acknowledgment of Service attached. [81]

[Endorsed]: Lodged December 9, 1955. Filed December 12, 1955.

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[Title of District Court and Cause.]

AFFIDAVIT OF CLIFFORD O. BOREN AND  
DELTA M. BOREN

United States District Court,  
Southern District of California—ss.

Clifford O. Boren and Delta M. Boren, each being first duly sworn, depose and say:

In response to the order of the above-entitled Court made and entered December 7, 1955, Clifford O. Boren President, Clifford O. Boren Contracting Co., Inc.; Delta M. Boren, Vice-President, Clifford O. Boren Contracting Co., Inc.; and Clifford O. Boren Contracting Co., Inc., and each of them, respondents, appeared before Special Agent Lloyd M. Tucker on Thursday, December 8, 1955 at 10:00 o'clock, a.m., at 3755 Sixth Avenue, San Diego, California, and produced the records called for in the summons attached to the petition herein, and then and there gave testimony with respect thereto as required by the summonses. [82]

Respondents, and each of them, respectfully declined, on advice of counsel, to permit the examination, copying, or photostating, of the records so produced.

Respondents intend to appeal the order made and entered by this Court December 7, 1955 to the United States Court of Appeals for the Ninth Circuit. Respondents were advised by their counsel that this Court had determined that said order was not a final and appealable order. Respondents were also advised that for an effective appeal to be taken a final order, adjudging respondents in civil contempt of this Court would have to be made.

The sole reason for respondents' refusal to permit the examination, copying, and photostating said records is to enable them to appeal to the United States Court of Appeals for the Ninth Circuit.

/s/ CLIFFORD O. BOREN

/s/ DELTA M. BOREN

Subscribed and sworn to before me this 13th day of December, 1955.

[Seal]        /s/ MARY JOAN TRUEBLOOD,  
Notary Public in and for said County of San Diego,  
State of California. [83]

[Endorsed]: Filed December 12, 1955.

[Title of District Court and Cause.]

## MINUTES OF THE COURT

Date: Dec. 13, 1955, at San Diego, Calif.

Present: Hon. Wm. C. Mathes, District Judge;  
Deputy Clerk: P. D. Hooser; Reporter, Don P. Cram; Counsel for Plaintiff: E. R. McHale; Counsel for Defendants: John A. Brant.

Proceedings: For hearing on order to Clifford O. Boren and Delta M. Boren to appear and show cause why they should not be held in civil contempt for failure to comply with order entered Dec. 5, 1955.

Attorney McHale states that respondents appeared and testified, but did not produce the things they were required to produce, and refused so to do.

Transcript of proceedings of Dec. 8, 1955, is filed as Gov't Ex. 1 in this hearing.

Court Orders that the respondents appear here at 2 o'clock this afternoon, petitioner will appear also, and that respondents bring with them the records called for in the summonses, and then deliver to petitioner for examination, copying, photographing, or photostating the records in question.

At 2 p.m. Court inquires of respondents if they have the records described in the summons, and respondents state they have.

Court Orders that respondents now deliver those records into the custody of the Clerk for examination, copying, photographing, or photostating.

Respondent Clifford O. Boren and Respondent

Delta M. Boren both decline to obey the Court's order upon grounds previously stated.

Court Orders Respondent Clifford O. Boren and Respondent Delta M. Boren into the custody of the U. S. Marshal to be by him imprisoned in a jail type institution until the affirmative order of this Court is obeyed.

Court also Finds the corporation guilty of contempt and assesses a fine of \$110 to be paid to the Clerk, and by the Clerk paid to the U. S. Gov't.

Counsel for Gov't will prepare formal order and submit it today.

Attorney Brant moves for a stay of execution and to fix a cash deposit in lieu of supersedeas and requests that such deposit be in the amount of \$1,000.

Court states it will grant motion for stay of execution pending appeal and fix bond in the amount of \$1,000, upon condition that the records here in court be delivered into the custody of the Clerk under seal and that the Clerk keep them under seal pending further order of the Court.

Attorney Brant delivers to the Clerk General Journal, nine sheets, marked for ident., as Respondents' Exhibit A; Cash Journal, marked for ident., as Exhibit B; and General Ledger, marked for ident., as Respondents' Exhibit C; Payroll Records, two sets, marked as Exhibit D; and 120 Checks, cancelled, marked as Exhibit E.

Cash deposit in lieu of supersedeas bond is approved by the Court and filed, not only as a supersedeas bond, but as bond pending appeal.



Notice of appeal is presented for filing. Cashier's Check in the amount of \$1,000 is received by the Clerk from Attorney Brant.

Court Orders respondents released on bail pending appeal and may remain on bail pending appeal.

JOHN A. CHILDRESS,  
Clerk

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[Title of District Court and Cause.]

### CASH DEPOSIT IN LIEU OF SUPERSEDEAS BOND

The respondents, having filed Notice of Appeal on the judgment of this Court made and entered on the 13th day of December, 1955, to the United States Court of Appeals for the Ninth Circuit, herewith deposit with the Clerk of this Court the sum of One Thousand Dollars (\$1,000.00), subject to the orders of the Court, as security that respondents, and each of them, shall prosecute and appeal to effect and shall satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, or shall satisfy in full such modification of the judgment and such costs, interest and damages as the said Court of Appeals may adjudge and award.

The sum so deposited is the property of the respondent Clifford O. Boren Contracting Co., Inc., a California corporation.



The sum so deposited is hereby made subject to the provisions of Rule [84] 8(c) of the Local Rules of the United District Court, Southern Division.

/s/ JOHN A. BRANT,  
Attorney for Respondents

United States District Court,  
Southern District of California—ss.

On December 13, 1955, before me, the undersigned, a Notary Public in and for said County and State, personally appeared John A. Brant, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same.

Witness my hand and official seal.

[Seal]        /s/ MARY JOAN TRUEBLOOD,  
Notary Public in and for the County of San Diego,  
State of California.

Examined and recommended for approval as provided in Rule 8.

/s/ JOHN A. BRANT

I hereby approve the foregoing.

Dated this 13th day of December, 1955.

/s/ WM. C. MATHES,  
U. S. District Judge        [85]

[Endorsed]: Filed December 13, 1955.

[Title of District Court and Cause.]

### ORDER

The above matter came on for hearing before the Court, the Honorable Wm. C. Mathes, the United States District Judge, presiding, without a jury, at 10:00 o'clock am., December 13, 1955, the petitioner represented by his counsel, Laughlin E. Waters, United States Attorney, and Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, and the respondents represented by their counsel, Torrance & Wansley and John A. Brant, pursuant to the order of Court of December 7, 1955, and it appearing to the satisfaction of the Court that the respondents, and each of them, did appear before the petitioner at the time and place specified, on December 8, 1955, and testify, and bring with them the records called for in the summonses heretofore served on them and attached to the petition herein, but did then and there fail and refuse to produce for examination, copying, and photostating or photographing said records, by petitioner, now

It Is Hereby Ordered, Adjudged and Decreed that the respondents, Clifford O. Boren Contracting Co., Inc.; Clifford O. Boren, President, Clifford O. Boren Contracting Co., Inc.; and Delta M. Boren, Vice-President, Clifford O. Boren Contracting Co., Inc.; and each of them, appear before this Court at 2:00 o'clock p.m., December 13, 1955, and produce for examination, copying, and photostating

or photographing, the records called for in the summonses attached to petition herein and heretofore served upon them.

Dated: December 13, 1955.

/s/ WM. C. MATHES,  
U. S. District Judge

Approved as to Form pursuant to Local Rule 7(a) this 13th day of December, 1955.

TORRANCE & WANSLEY,  
/s/ By JOHN A. BRANT

[Endorsed]: Filed December 13, 1955. Judgment Docketed and Entered December 15, 1955.

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[Title of District Court and Cause.]

## ORDER GRANTING IN PART AND DENY- ING IN PART MOTION TO STRIKE

On Monday, December 5, 1955, at 2 p.m., the above matter came on for hearing on the orders to show cause issued to respondents, the petitioner moved to strike from the Answer to Petition for Orders of Attachment of Person for Civil Contempt filed November 10, 1955, the separate defenses numbered Second to Ninth, inclusive, and the Court, having considered the arguments of counsel, pleadings and memoranda on file, and good cause appearing therefor,

It Is Hereby Ordered, Adjudged and Decreed that petitioner's motion to strike from the answer

the Second and Ninth separate defenses may be and is granted and his motion to strike the other separate defenses, Third to Eighth, inclusive, may be and is denied.

Done in open Court, December 5, 1955.

/s/ WM. C. MATHES,  
U. S. District Judge [86]

Approved as to Form pursuant to Local Rule 7(a) this 30th day of December, 1955.

TORRANCE & WANSLEY,  
/s/ By JOHN A. BRANT [87]

[Endorsed]: Filed January 4, 1956.

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In the United States District Court for the Southern District of California, Southern Division

No. 1780-SD—Civil

LLOYD M. TUCKER, Special Agent, Internal  
Revenue Service, Petitioner,

vs.

CLIFFORD O. BOREN CONTRACTING CO.,  
INC., etc., et al., Respondents.

JUDGMENT OF CIVIL CONTEMPT AND ORDER COMMITTING RESPONDENTS TO CUSTODY

This matter came on regularly for hearing before the Court, sitting without a jury, the Honorable

Wm. C. Mathes, United States District Judge, presiding, at 2:00 o'clock p.m., December 13, 1955, the petitioner represented by his counsel, Laughlin E. Waters, United States Attorney, and Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, and the respondents represented by their counsel, Torrance & Wansley and John A. Brant, Esquire, and it appearing that said respondents and each of them, pursuant to order of Court, brought with them to Court the records called for in the summonses attached to the petition herein and heretofore served upon them, but in open court failed and refused to obey the order of Court commanding them to produce said records for examination, copying, and photostating or photographing by petitioner,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed: [88]

I.

That respondents, Clifford O. Boren, President, Clifford O. Boren Contracting Co., Inc.; Delta M. Boren, Vice-President, Clifford O. Boren Contracting Co., Inc.; Clifford O. Boren Contracting Co., Inc.; and each of them, are in civil contempt of this Court for failing and refusing to produce for examination, copying, photostating or photographing by petitioner the records called for in the summonses attached to the petition herein and heretofore served upon them, to-wit: General Journal, Cash Journal, General Ledger, Payroll Records and Payroll Checks bearing the endorsement of any of

the following named persons: Clifford O. Boren, Delta M. Boren, Marjorie H. Bell, Betty K. McCarthy, and the Clifford O. Boren Contracting Company, Inc., for the period from July 1, 1951, to December 31, 1951.

## II.

That respondents, Clifford O. Boren, President, Clifford O. Boren Contracting Co., Inc.; and Delta M. Boren, Vice-President, Clifford O. Boren Contracting Co., Inc.; and each of them, be and are committed to the custody of the United States Marshal to be imprisoned in a jail type institution until the order of this Court is obeyed, and there to remain until they make known to the Court their willingness to obey the Court's orders and until they affirmatively comply with the orders of the Court.

## III.

That the Clifford O. Boren Contracting Co., Inc. be assessed a compensatory fine of \$110.00 to be paid to the Clerk of the Court and by him paid to the United States of America.

## IV.

That petitioner have judgment for his costs by him expended in the sum of \$. . . . ., to be taxed by the Clerk of this Court.

Dated: December 13, 1955.

/s/ WM. C. MATHES,  
U. S. District Judge

[89]



Approved as to Form pursuant to Local Rule 7(a) this 13th day of December, 1955.

TORRANCE & WANSLEY,  
/s/ By JOHN A. BRANT [90]

[Endorsed]: Filed December 13, 1955. Judgment Docketed and Entered December 15, 1955.

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[Title of District Court and Cause.]

### ORDER GRANTING SUPERSEDEAS

On this 13th day of December, 1955, the parties hereto represented by their respective counsel of record, John A. Brant for respondents and movants, and Laughlin E. Waters, United States Attorney, and Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, attorneys for Lloyd M. Tucker, and

On motion of respondents, and each of them, for a stay pending respondents' appeal to the United States Court of Appeals for the Ninth Circuit, and of respondent Clifford O. Boren and Delta M. Boren for admission to bail, and it appearing to the Court that respondents have prepared a Notice of Appeal and desire to appeal the decision of the Court herein;

Now therefore, good cause appearing,

It Is Ordered, Adjudged and Decreed that the execution of and any proceedings to enforce the judgment made and entered herein on December 13, 1955, be stayed pending the determination of respondents' appeal from such [91] judgment, and

respondents Clifford O. Boren and Delta M. Boren are admitted to Bail pending such determination; provided that respondents deposit with the Clerk of the Court cash in the total amount of \$1,000.00, with a Deposit Statement to be approved by this Court conditioned in accordance with Rule 73(d) of the Federal Rules of Civil Procedure, and that said deposit be made subject to the provisions of Rule 8(c) of the Local Rules of the United States District Court, Southern Division. When so deposited the same shall stand accepted in the place of a supersedeas bond in that amount and operate to supersede the execution of the judgment entered in this action pending the final disposition of the respondents' appeal to the United States Court of Appeals for the Ninth Circuit, and shall be security for the admission of respondents Clifford O. Boren and Delta M. Boren to bail, and security for the fine assessed against Clifford O. Boren Contracting Co., Inc.

It is further ordered that the books and records specified in the summons be, and are hereby, impounded, under seal, with the Clerk of this Court.

Dated: December 13, 1955.

/s/ WM. C. MATHES,  
U. S. District Judge

Approved as to Form this 13th day of December, 1955.

LAUGHLIN E. WATERS,  
United States Attorney,

EDWARD R. McHALE,

Asst. U. S. Attorney

/s/ By EDWARD R. McHALE,

Attorneys for Petitioner

TORRANCE & WANSLEY,

/s/ By JOHN A. BRANT,

Attorneys for Respondents [92]

[Endorsed]: Filed December 13, 1955.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that Clifford O. Boren, Delta M. Boren and Clifford O. Boren Contracting Co., Inc., and each of them, respondents above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from a Final Judgment entered in this action on December 13, 1955, adjudging respondents, and each of them, in contempt of the Court.

Dated: December 13, 1955.

TORRANCE & WANSLEY,

/s/ By JOHN A. BRANT,

Attorney for Respondents [93]

[Endorsed]: Filed December 16, 1955.

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 99, inclusive, contain the original

Petition for Orders of Attachment, etc.;

Order to Show Cause re Clifford O. Boren;

Order to Show Cause re Delta M. Boren;

Affidavit of Lloyd M. Tucker (filed in Case No. 1774-SD);

Motion to Vacate Order to Show Cause;

Memo in Opposition to Respondents' Motion to Vacate OSC;

Answer to Petition for Orders of Attachment, etc.;

Affidavit of Lloyd M. Tucker;

Brief in Opposition to Petition;

Memo in Support of Orders to Show Cause, etc.;

Affidavit of John A. Brant;

Findings of Fact and Conclusions of Law;

Motion for Writ of Supersedeas Pending Appeal;

Order;

Order Denying stay of Judgment and Writ of Supersedeas;

Affidavit of Clifford O. Boren and Delta M. Boren;

Cash Deposit in Lieu of Supersedeas Bond;

Order Granting in Part and Denying in Part Motion to Strike;

Judgment of Civil Contempt and Order Committing Respondents to Custody;  
Order Granting Supersedeas;  
Notice of Appeal;  
Designation of Contents of Record on Appeal;  
Appellee's Additional Designation of Contents of Record; and a full, true and correct copy of the Minutes of the Court on December 5, 1955; December 7, 1955; which, together with four vols. of reporter's transcript of proceedings had on Monday, December 5, 1955; Wednesday, December 7, 1955; and Tuesday, December 13, 1955; and Government's Exhibit 1 and respondents' Exhibit C, in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellants.

Witness my hand and the seal of said District Court, this 25th day of January, 1956.

[Seal]                      JOHN A. CHILDRESS,  
   Clerk

/s/ By CHARLES E. JONES,  
   Deputy

In the United States District Court for the Southern District of California, Southern Division

No. 1780-SD—Civil

LLOYD M. TUCKER, etc.,                      Petitioner,

vs.

CLIFFORD O. BOREN CONTRACTING CO.,  
INC., et al.,                      Respondents.

TRANSCRIPT OF PROCEEDINGS  
(Partial Transcript)

San Diego, California, Monday, Dec. 5, 1955

Honorable William C. Mathes, Judge Presiding.

Appearances: For the Petitioner: Laughlin E. Waters, United States Attorney; by Edward R. McHale, Asst. United States Attorney. For the Respondents: Torrance & Wansley, by John A. Brant, Esq., 625 Broadway, Suite 1216, San Diego, California. [1\*]

\* \* \* \* \*

The Clerk: Case No. 1774, Clifford O. Boren, et al. vs. Lloyd M. Tucker.

Mr. Brant: Ready for the plaintiffs in that action, your Honor.

As I understand it, that action is to be held in abeyance or continued until after the decision is rendered in case No. 1780, your Honor, which immediately follows that case on the calendar.

The Court: No, it won't be because I am going

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\* Page numbers appearing at top of page of original Reporter's Transcript of Record.



to dismiss it for want of jurisdiction. The court has no jurisdiction of an action of that kind. There is a motion to dismiss on file in Case No. 1774, unless there is something else to be said——

Mr. Brant: No, your Honor.

The Court: ——I will grant the motion to dismiss for lack of jurisdiction over the subject matter, and direct the defendant to prepare and settle under Local Rule 7 within five days judgment of dismissal,——

Mr. McHale: Very well, your Honor.

The Court: ——for lack of jurisdiction over the subject matter. And the judgment will not constitute an adjudication on the merits, and will so show. [2]

The Clerk: Case No. 1780, Lloyd M. Tucker vs. Clifford O. Boren Contracting Company, Inc., et al.

Mr. McHale: Ready for the petitioner Tucker, your Honor.

Mr. Brant: Ready for all three respondents, your Honor.

The Court: Very well. You may proceed.

Does that complete the call, Mr. Clerk?

The Clerk: Yes, your Honor.

Mr. Brant: If the court please, I would like to make a short statement before we get into this matter.

The Court: You may.

Mr. Brant: Your Honor, my name is John A. Brant and I have represented the respondents in this action from its commencement until now. On last Friday I received an affidavit and a memoran-

dum in support of the petition. Thereupon it became necessary for me, as one of the attorneys, to file an affidavit in this case, which I have done, and it was filed in this case this morning.

The affidavit relates to more than formal matters, and I feel it is incumbent upon me at this point, and I also feel I have the ethical obligation to request the court's permission to withdraw as attorney in this case since I have filed this affidavit and since it may become necessary, if the court so desires, for me to testify in this case. And I feel that unless both court and counsel agree to my continuance as attorney in this case my request should be granted, your Honor. [3]

Mr. McHale: I take it this is Mr. Brant, yourself, withdrawing as counsel?

Mr. Brant: That is correct.

Mr. McHale: The firm of Torrance & Wansley has filed an appearance, your Honor.

The Court: Are the matters in Mr. Brant's affidavit of a sufficiently controversial nature to——

Mr. McHale: I think they are, your Honor. I don't think they are material to the pleadings, but I think if the court goes into them they are controversial. Of course, I don't care one way or the other, as far as that is concerned. But I think they would be controverted, parts of them.

The Court: Of course, your move is very appropriate and highly ethical, Mr. Brant, but in view of the Government's attitude it would be just a question of about how you feel about it. It isn't as if there were a jury here.

Mr. Brant: I have this morning briefed Mr. Albert Strang, who is an associate in our office, on the case. I do feel that the respondents here in this case, because of my greater familiarity with the matters, would be greater represented if I continued in the case. But I find my ethical position rather difficult. I would hesitate to stand here before this court and argue the truth or falsity of my own testimony. [4]

The Court: The Government deems the matters immaterial to the issues, so I would say it would be entirely up to you, just how you feel about it.

Mr. Brant: I do feel my clients would be better represented, because of the fact that Mr. Strang has only been able to spend a very few hours with the case, if I were permitted to continue as counsel.

The Court: If you feel like continuing, you may do so.

Mr. Brant: Thank you, your Honor, I shall.

The Court: Very well.

Mr. Brant: I understand the first matter is a motion to vacate the order to show cause, your Honor, in which the respondents are the moving parties.

The Court: Very well.

Mr. Brant: Is that your understanding, Mr. McHale?

Mr. McHale: I don't know if it is the first matter. I think it's a question of what the court wants to hear first. The orders to show cause were issued first by Judge Westover and continued over from

time to time until today. The motion to vacate was filed at a later time, your Honor.

The Court: The motion to vacate will be taken up first because if it is granted that disposes of the matter, does it not. That is a motion, in effect, to discharge the order to show cause.

Mr. Brant: That is correct, in at least two material respects, your Honor. [5]

The Court: I take it it is addressed to the sufficiency of the petition itself.

Mr. Brant: Yes, sir.

The Court: I will hear that first.

Mr. Brant: Your Honor, the respondents have moved to vacate the order to show cause on the ground that the petition fails to state a claim upon which an attachment against the respondents, or either one of them, could issue as for contempt, and that it fails to state a claim upon which respondents, or either of them, could be held in civil contempt.

The Court: Now, before you proceed, Mr. Brant, these respondents are Clifford O. Boren and Delta M. Boren—who is the third?

Mr. Brant: The Clifford O. Boren Contracting Co., Inc.

The Court: Are Clifford O. Boren and Delta M. Boren present?

Mr. Brant: Yes, they are, your Honor. Will you please stand?

(Whereupon the two respondents stood.)

The Court: Very well. They appear for the corporation as well?

Mr. Brant: Yes, your Honor.

The Court: You may proceed.

Mr. McHale: May I clarify one thing, your Honor. The respondents are named as such in their corporate capacities [6] in the petition as Clifford O. Boren, president of the Clifford O. Boren Contracting Co. and Delta M. Boren, vice president of the Clifford O. Boren Contracting Co.

The Court: Do they appear here in those capacities?

Mr. Brant: Yes, your Honor, they do.

The Court: Very well.

Mr. Brant: The order to show cause, your Honor, in all three of them addressed to the individual respondents, the two individual respondents and the one corporate respondent, require that they appear in court at a time and on a date stated, and to show cause, if any there be, why an attachment should not issue against the particular respondent as for a contempt, and why the respondent should not be compelled to answer the petitioner's questions and produce books, records, paper and data referred to in said petition. And further why each of the respondents should not be held in civil contempt.

It is the respondents' position, your Honor, that an action for an attachment, or an action to find any one of the respondents in civil contempt is inappropriate at this stage.

This case arises out of three administrative summonses issued by the petitioner Lloyd M. Tucker, who is an agent of the Internal Revenue Service.



It is our position that Mr. Tucker is properly in court—can properly come to court, rather, to seek an order from this court directing the [7] respondents to appear before him and to produce the records for his examination. If he obtains such an order from this court and then if the respondents fail to comply with the court's order, not with an instruction from the petitioner, but if they fail to comply with the court's order then and thereafter the petitioner, Mr. Tucker, may bring an action for civil contempt.

Now, this matter has not been decided, your Honor, under the present section under which Mr. Tucker has issued these summonses. That is Section 7602 of the Internal Revenue Code of 1954. However, under the code section which immediately preceded Section 7602 it was decided that the refusal to comply with a Special Agent's summons or an Internal Revenue Agent's summons issued under a like code section was not in and of itself contemptuous conduct and could not be punished as contemptuous conduct; but failure to comply merely gave rise to the right on the part of the officer issuing the summons to petition for an order to produce.

Now, it was decided in the case of Isidore Wolrich, et al. vs. Naboshek, Gurian & Lindenbaum, a 1949 case in the United States District Court for the Southern District of New York, the citing being 84 F. Supp. 481, the court was called upon to consider the nature of the powers which had been conferred upon the Commissioner of Internal



Revenue and his agents by Section 3614(a) of the Internal Revenue Code [8] of 1939, which section has been incorporated into Section 7602 of the present Internal Revenue Code. And in that case the court stated, and my quotation will be rather short, your Honor,

“Unlike the Collector of Internal Revenue, 26 U.S.C.A., Sec. 3615, the Commissioner has now power of subpoena in his own right. He can merely examine books and records and ‘require’ the attendance of persons having knowledge in the premises. If the party whose attendance is ‘required’ fails to attend, the Commissioner may ask the District Court ‘by appropriate process to compel such attendance, testimony, or production of books, papers, or other data’.” Citing 26 U.S.C.A. Sec. 3633.

And then the court continues,

“A subpoena, subpoena duces tecum, or order to appear and produce is patently an appropriate process. If it is disregarded, then contempt proceedings may ensue. The Collector, however, does not need the aid of the Court to compel attendance or production. If a Collector’s summons is disregarded, contempt proceedings may ensue immediately.”

Citing 26 U.S.C.A. Sec. 3615.

And there is an additional decision in accord with that, “In the Matter of Albert Lindley Lee Memorial Hospital,” a [9] 1953 decision, District Court for the Northern District of New York. This has no official report, but it is contained in the Commerce Clearing House works 53-1 USTC, para-

graph 9266. Now, that was the District Court decision which was not reported. The Circuit Court of Appeals did affirm that decision and the official citation there is 209 F. 2d 122.

Section 7602 of the Internal Revenue Code of 1954, your Honor, consolidated Sections 3614, 3615(a),(b) and (c) and 3632(a)(1) of the Internal Revenue Code of 1939. Your Honor will recall that the Internal Revenue Code of 1954 was a reorganization of the Code, and one of the primary efforts was to consolidate many different sections under one heading.

The consolidation of these various sections into Section 7602 we submit, your Honor, resulted in no material change from the law which previously existed. And this is borne out by the report of the Committee on Ways and Means of the House of Representatives on the Bill H.R. 8300, contained in Report No. 1337, page 436.

It was there pointed out that the only change made in the section according to the committee report was a technical change by the Senate which struck out the words—which was contained in one of the sections—“or any other person having knowledge in the premises” and inserting in the section “or any person having possession, custody, or care of books of account containing entries relating to the business [10] of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper.”

The reports point out that this was merely a

technical change and that the consolidation of the sections did not bring about any material change in the law which had previously existed.

Now, as the second point I should like to bring out that the Federal Administrative Procedure Act prevents the imposition of any sanctions upon a party for failure to comply with the administrative summons, for the failure in and of itself.

Now, the Federal Administrative Procedure Act expressly recognizes the right of parties subject to an administrative subpoena to contest the validity of the subpoena in the courts prior to being subjected to any forms of penalty for non-compliance.

Section 1005(c), Title 5 of the United States Code provides in part—and I quote—

“Upon contest the Court shall sustain any such subpoena \* \* \*”

That refers to an administrative subpoena—

“\* \* \* or similar process or demand to the extent that it is found to be in accordance with law, and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness [11] or the production of evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.”

Now, it has been held that Section 1005, your Honor, is applicable to a summons issued by a petitioner such as we have here, an Internal Revenue agent.

The Court: Your position is, as I understand it, that that portion of the order to show cause which directs these respondents to show cause why they should not be punished as for civil contempt should be discharged; that they should be called upon to show cause first why they should not produce the records and answers questions as called for in the subpoena.

Mr. Brant: That is correct, your Honor.

The Court: And that if the subpoena be sustained upon that hearing that the order be that within a certain specified time they either produce the records or show cause before the court why they should not be committed for contempt. Is that it?

Mr. Brant: Well, essentially that, your Honor; but here today the petitioner is certainly entitled to ask this court for an order requiring the respondents to appear before him at a date within a reasonable time, a date to be set by the court, to appear and produce the records and to testify before him. [12]

Now on failure to do so then the petitioner has the right to come in and ask that these parties be held in contempt for failure to obey the court's order. It is our position that failure to comply with this administrative summons is not in and of itself contemptuous conduct and cannot be punished.

The Court: I will hear from the Government on that.

Mr. Brant: May I give to your Honor one citation on the last point that I made that this Section

of the Administrative Procedure Act 1005 is applicable to a summons issued by an Internal Revenue Agent, and that decision is *U. S. vs. Aylmer, A-y-l-m-e-r, V. Smith, et al.*, a 1949 decision, District Court of Connecticut, 87 *Fd. Supp.* 293.

Thank you, your Honor.

The Court: This order to show cause directs the respondents to appear and show cause, one, why an attachment should not be issued against him as for a contempt and, two, why he should not be compelled to answer petitioner's questions and produce books, records, papers and data referred to in said petition; and three, further why he should not be held in civil contempt.

As I understand the respondents' motion, it is that the order to show cause should be discharged as to the whys one and three, and this hearing should proceed upon the why No. 2. Is that a fair statement? [13]

Mr. Brant: That is correct, your Honor; yes, sir.

Mr. McHale: I would like to clarify one thing, your Honor: Prior to the enactment of the 1954 Code there was in the 1939 Revenue Code two sections with respect to the production of books and records and requiring persons to testify. One of them was Section 3614 of the Internal Revenue Code of 1939, which had to do with the Commissioner's summons; and with respect to the cases recited by counsel and the provisions of it, counsel is substantially right. There was no contempt and failure to obey so-called Commissioner's sum-



mons. The procedure that was adopted and the courts held should be followed was that upon failure of a witness to obey the summons the Commissioner would apply to the United States District Court for an order directing the witness to do the same thing that the agent's summons asked. Only upon failure of the person to obey the court's order was there a proceeding for contempt. That is under old Section 3614. And there have been very many cases. There is no question about the fact that that was the procedure. There was a case that went up from the Southern District of California within the last couple of years, Chapman vs. Goodman, in the Ninth Circuit, which proceeded on that very basis.

There was, however, another procedure under the 1939 Revenue Code under Section 3615. Section 3615 had to do with the Collector of Internal Revenue and his summons. [14] As your Honor will recall, before the reorganization of the Bureau of Internal Revenue there was quite a difference in the functions of the Collector of Internal Revenue and the Commissioner of Internal Revenue. The Collector had a quite different summons than the Commissioner. And it was a much more powerful summons in that upon failure of anyone to obey the Collector's summons he could proceed before a Commissioner of the United States Court or United States Court itself and as for attachment, writ of attachment to be issued by the court or by the Commissioner to bring the witness before a judge or commissioner immediately. That pro-



cedure has been followed in connection with Collectors' summonses in this district.

In enacting the Internal Revenue Code of 1954 there was no reason to continue the separate functioning; the whole Internal Revenue Service had been reorganized, the functions had been integrated. There now was no longer separate branches of the Collector's and Commissioner's agents. And therefore the enactment in Section 7602 and 7604 of these discovery proceedings, of the examination and inspection of books and records, it followed more closely the old Collector's summons in that Section 7604(b), entitled "Enforcement" reads,

**"Whenever any person summoned under Section 7602 neglects or refuses to obey such summons or to produce the books, papers, records or other [15] data or to give testimony as required, the Secretary or his delegate may apply to the judge of the District Court or to a United States Commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application and if satisfactory proof is made, to issue an attachment directed to some proper officer for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States Commissioner shall have the power to make such order as he shall deem proper, not inconsistent with the law for the punishment for contempts, to enforce obedience to the requirements of the**

summons and to punish such person for his default or disobedience."

This action proceeded on September 19, 1955, by the filing of such an application petition. It proceeded before Judge Westover who was then sitting in the Southern Division. Mr. Brant was present in connection with Case No. 1774-SD, representing the Borens and the Clifford O. Boren Contracting Co., and he was present in open court when I made the application to Judge Westover to issue the writs of attachment for contempt. In the alternative I prepared these orders to show [16] cause to bring the persons into court at a time and place certain to show cause why they should not be deemed to be in contempt and require them to answer.

The Court: In contempt of whom and of what?

Mr. McHale: In contempt of this summons of the Special Agent of the Internal Revenue.

The Court: Do you know of any precedent for holding a person in contempt of an administrative official?

Mr. McHale: Well, I think, your Honor, that the contempt might be denominated in the event it is in the presence of the court, it might be called a contempt of court because the procedure as set up requires that the actual hearing be held before the court.

The Court: What I am getting at is that it seems to me that it may be just a difference in somatics here. Suppose the petition were granted today. Wouldn't the order, of necessity, be that these respondents produce and testify as called for,

or at some future time show cause why they should not be held in civil contempt of court? Wouldn't that be the order?

Mr. McHale: I think, your Honor, that this section contemplates that the persons are brought into court, their books and records, and if the court deems that the application is sufficient that they be then and there directed to produce their books and records. [17]

The Court: Yes, at a certain time and place to be specified in the order; and in the event that they fail to do so that they show cause at some still subsequent time before the court why they should not be committed for contempt, punished for contempt.

Mr. McHale: I doubt, your Honor——

The Court: Or held in contempt. Would you today ask for an order that these respondents be held in contempt and be committed to the custody of the marshal until they do produce?

Mr. McHale: I think your Honor, that your Honor has the power here today, if it deems that the application is sufficient, to require the respondents to produce the books and records today. I mean that seems to me——

The Court: Oh, yes. It is a question of reasonableness of time. But the order would not now be, would it, that they be committed to the custody of the marshal to be by him imprisoned until they comply?

Mr. McHale: Well, if they here and now refuse, I think it would be.

The Court: Yes. But the order you would seek today, I take it, would be that at some time and place in the future to be fixed that they appear before these agents with their books and records as requested and give evidence; and that in the event they fail or refuse to do so that they [18] appear before this court at some future time and then and there show cause why they should not be punished for contempt, or held in contempt.

Mr. McHale: I am amenable to that procedure, your Honor. I believe that the court has little broader powers than that under the section. After all this could have proceeded with an attachment being issued by Judge Westover on the 19th of September. You see, it provides for a summary procedure. They could have been brought before the court the next day.

The Court: That is a method of bringing them before the Court, isn't it?

Mr. McHale: Yes.

The Court: Oh, yes. They could have been subjected to civil arrest, and, in fact, the marshal could have been sent out with an attachment to bring them before the court instant, in person. But the court didn't choose to do that. The court issued an order to show cause instead; and the substance of the order to show cause is, is it not, that they appear here today in response to the order to show cause and show cause, if any they have, why they should not be required to obey this subpoena.

Mr. McHale: Well, that is the substance of it.

The Court: And that if that be granted that they be directed to obey the subpoena at a time and place to be specified; and that in the event they fail to, or refuse to [19] do so, that they be back again and appear before this court to show cause why they should not be held in contempt.

Would not that be it?

Mr. McHale: It's one way, your Honor. I can see where the respondents could in a case refuse at the time of the order to show cause and they could then and there be ordered held in contempt of court. But as I say, either way, your Honor, wouldn't seem to make much difference.

The Court: The respondents' motion filed October 5, 1955, to vacate the order to show cause is granted to the extent that that portion of the order to show cause which reads, "\* \* \* why an attachment should not issue against him for a contempt," shall be discharged.

Otherwise the motion is denied. And, otherwise, the order to show cause will remain in full force and effect as to why the respondents should not be compelled to answer petitioner's questions and produce books, records, papers and data referred to in said petition, and further why he should not be held in civil contempt, in the event that they shall fail and refuse to comply with the court's order.

Now, you may proceed upon the petition on the theory that that is the order to show cause. I will ask you, Mr. Brant, to prepare and settle under



Local Rule 7 within five days a formal order on your motion embodying those rulings. [20]

Mr. Brant: Yes, sir.

Mr. McHale: On the petition then of Lloyd M. Tucker, your Honor, it was filed on September 19th, the verified petition of Lloyd Tucker, with Exhibit A attached thereto. The respondents have filed a response which they have denominated "an answer."

The procedure in this type of matter, as the Ninth Circuit has said, *sui generis*, it proceeds, I believe, under Federal Rule of Procedure, I think, 8183. However, I think it is contemplated that in the event of any disputes as to the facts that the court of course could take testimony.

Now, I would like to incorporate by reference, or introduce as an exhibit here the Affidavit of Mr. Tucker that he made in Action 1774-SD.

The Court: Do you offer that as—

Mr. McHale: In addition to the affidavits filed in this action which I would like to offer in evidence, I would like to offer his affidavit previously filed in 1774-SD.

The Court: Now, there are two affidavits, plus the verified petition?

Mr. McHale: That is right, your Honor.

The Court: In 1774—

Mr. McHale: That's called the affidavit of Lloyd M. Tucker—

The Court: —filed September 19, 1955, and verified that day. [21]

Mr. McHale: Yes, your Honor.



The Court: And the affidavit of Lloyd M. Tucker filed in 1780, December 1, 1955, and verified the 30th of November.

Mr. McHale: Yes, your Honor.

The Court: And the verified petition,—

Mr. McHale: Yes, your Honor.

The Court: —filed September 19, 1955.

May the two affidavits and the verified petition be received in evidence by stipulation as the direct testimony of the petitioner Lloyd M. Tucker?

Mr. Brant: Your Honor, we would have to ask that these affidavits not be received in evidence, and we would have to ask that the Government bear their proper burden of proving the facts which they have alleged in their petition which are yet in issue.

The Court: Well, I merely suggested it in the interest of saving time. I assume if we take the time to listen to Mr. Tucker, he will get on the stand and say the same things under oath here this afternoon as he has said in the affidavits and the petition. I thought we would save the time, and then let you cross examine him on them if you wanted to.

Mr. Brant: Your Honor, I believe counsel and I can stipulate as to the facts as far as the petition and these affidavits are concerned, and also the facts which we have alleged [22] in our affirmative defense if we have a short opportunity to do so. I think we can short-cut this proceeding very markedly if we would have a short recess for that purpose.

The Court: The court will be in recess subject to call. Let the clerk know when you are ready.

(Short recess)

Mr. McHale: During the recess, your Honor, we have come to an agreement as to the evidence that may go in, that is, with respect to the affidavits and some of these verified pleadings. I will start first by saying that the verified petition and verified answer and the affidavit of Lloyd M. Tucker in No. 1774-SD, filed September 19, 1955, and the affidavit of Lloyd M. Tucker filed December 1, 1955 in this action—when I say the answer I mean the response, the first defense. Now,—

The Court: Just a moment. Let's get that all straight.

Is it agreed that the petition filed September 19th shall go in as the direct testimony of the petitioner?

Mr. Brant: That is correct, your Honor.

The Court: It will be received as Petitioner's Exhibit No. 1 in evidence, pursuant to stipulation.

(The exhibit referred to was marked Petitioner's Exhibit 1 and received in evidence.)

[See pages 3-8.]

The Court: Then it is agreed that the affidavit of Lloyd M. Tucker verified in Case No. 1774, verified September 16, 1955—verified September [23] 15th—is that the one?

Mr. McHale: I don't have the date on my copy, your Honor. The affidavit of Lloyd M. Tucker in opposition to Plaintiff's motion for preliminary in-

junction filed September 19, 1955. I am sorry. My copy doesn't conform.

The Court: Yes. I have it here. It was filed, verified and filed September 19, 1955. Pursuant to stipulation that is received as Petitioner's Exhibit 2.

Mr. Brant: Mr. Tucker would have so testified on the stand. Yes, sir.

The Court: Well, as I understand this entire stipulation it is that he will be deemed to have been called and to have testified on direct examination, to have been sworn and testified on direct examination to the facts set forth in these two affidavits and in the verified petition.

Mr. Brant: That is correct, yes, sir.

The Court: Then this affidavit is Petitioner's Exhibit No. 2 in evidence pursuant to the stipulation.

(The exhibit referred to was marked Petitioner's Exhibit 2 and received in evidence.)

[See pages 11-14.]

The affidavit of Lloyd M. Tucker verified November 30th and filed in Case No. 1780 December 1, 1955, is received pursuant to the stipulation as Petitioner's Exhibit 3. Is that correct?

Mr. Brant: Yes, sir. [24]

(The exhibit referred to was marked Petitioner's Exhibit 3 and received in evidence.)

[See pages 33-36.]

The Court: Now, you may wish to cross examine on that.

Mr. Brant: We may wish to cross examine. And I

believe counsel and I have both agreed that we may question, insofar as the affidavits are concerned, the materiality of the affidavits, or relevancy.

The Court: You may move to strike any portion.

Mr. Brant: Yes, your Honor.

Mr. McHale: Move to strike, yes, your Honor.

The Court: Then the petition and the two affidavits, Exhibits 1, 2 and 3, are received pursuant to the stipulation as, pro tanto, the direct testimony, the testimony on direct examination of the petitioner.

Mr. Brant: That is correct.

The Court: Now, there was something in the answer?

Mr. McHale: Your Honor, the respondents have raised separate defenses to the petition. It is the Government's position, of course, that these separate affirmative defenses are insufficient, are immaterial and irrelevant to the issue presented here. However, we have stipulations with respect to certain facts in there if the court gets to that. Now,—

The Court: Well, you may stipulate and then object to the admissibility, of course, of the stipulation. [25]

Mr. McHale: Yes. And then there will be certain objections——

The Court: Or move to strike.

Mr. McHale: Yes. Mr. Brant will go through it, and it is sentence by sentence, your Honor, so it will be a little slow, but I think we can accomplish quite a bit.

Mr. Brant: Your Honor, I might mention first,

I understand counsel to be willing to stipulate in the same manner in which we stipulated on his petition that the first defense to the petition, that is, paragraphs numbered I, II and III on pages 1 and 2 are before the court in the same manner that the petition is before the court.

The Court: That is paragraphs I, II and III of the Answer to Petition for Orders of Attachment of Person for Civil Contempt filed November 10, 1955?

Mr. Brant: That is correct, your Honor.

The Court: Then pursuant to the stipulation the allegations of those three paragraphs are received as the testimony on direct examination of the respondent. Is that it?

Mr. McHale: Yes, your Honor.

The Court: Very well.

Mr. Brant: As to the second defense, I,—

The Court: That will be Respondents' Exhibit A, paragraph I, II and III of the petition, so it will have some identification. [26]

(The exhibit referred to was marked Respondents' Exhibit A for identification.)

Mr. Brant: Your Honor, as to the second and subsequent defenses we have arrived at piecemeal stipulations as to various facts, and I think it would perhaps be better for me to identify the paragraph number and read what has been stipulated to, and then the court may hear counsel's agreement to that. If that procedure is acceptable, that is the procedure I will follow.

The Court: Yes. You may proceed.



Mr. Brant: Paragraph numbered I of the second and separate defense, it is stipulated that

“Agents of the Bureau of Internal Revenue commenced the examination of the Federal income tax returns of Clifford O. Boren and Delta M. Boren for the taxable years 1950 and 1951 on or about November 2, 1953.”

Mr. McHale: So stipulated.

Mr. Brant: As to paragraph numbered III of the second and separate defense it is stipulated that on or about April 28, 1954, Internal Revenue Agent Ford requested that a special agent of the Intelligence Division be assigned to co-operate with him in the investigation.

It is also stipulated that on or about May 11, 1954, Special Agent Lloyd Tucker was assigned to co-operate in the examination of [27] Delta M. Boren for the years 1950 and 1951.

Mr. McHale: So stipulated.

Mr. Brant: In connection with paragraph IV of the same defense, it is stipulated that on or about October 6, 1954, Delta M. Boren, through her attorney John Brant, reported irregularities on the part of former Internal Revenue Agent Ford after he left the Service.

It is also stipulated that on or about—in connection with the same paragraph—October 6, 1954, the case was reassigned to Internal Revenue Agent Forrest P. Calkins, who proceeded from Los Angeles to San Diego to resume the examination of Delta M. Boren for the years 1950 and 1951 on or about October 18, 1954.



Mr. McHale: So stipulated.

Mr. Brant: It is also stipulated that Revenue Agent Charles D. Ford resigned from the service on or about September 10, 1955.

In connection with paragraph VII of the same defense, it is stipulated that Revenue Agent Calkins stated at that time, on or about October 20, 1954, that he wanted to start from scratch.

In connection with paragraph VIII of the same defense, it is stipulated that on or about December 7, 1954, petitioner Tucker and Revenue Agent Calkins commenced the examination of the returns of Clifford O. Boren and Delta M. Boren for [28] the calendar years 1950 and 1951; and that they demanded that the corporation make available to them the books, papers, records and other data of the corporation for the fiscal year July 1, 1951 to April 30, 1952, to be used by them in the examination of the returns of Clifford O. Boren and Delta M. Boren for the years 1950 and 1951. Tucker and Calkins agreed to contemporaneously examine the said books and records for the dual purposes of ascertaining the tax liability of Clifford O. Boren and Delta M. Boren for the calendar years 1950 and 1951; and of ascertaining the tax liability of the corporation for the fiscal year ended April 30, 1952.

During the period December 7, 1954 and July 15, 1955, Tucker and Calkins examined the corporate books for these dual purposes—corporate books and records for these dual purposes.

In connection with paragraph IX, of the same

defense, in the conduct of the examination of the corporation's books and records by Tucker and Calkins, they had available for examination, and did examine, the general journal, cash journal, general ledger, pay roll records, and all of the pay roll checks of the corporation for the period July 1, 1951 to April 30, 1952. Calkins made extensive notes and transcripts from said books and records, and the pay roll checks and records, Tucker and Calkins examined the pay roll records and check and Tucker made abstracts of information from the pay roll records and [29] checks. These examinations were made in connection with the matter of the tax liability of Clifford O. Boren and Delta M. Boren for the calendar years 1950 and 1951 and the Clifford O. Boren Contracting Co., Inc.

Mr. McHale: So stipulated, your Honor.

Mr. Brant: In connection with paragraph X, it is stipulated that during the period between July 11, 1955 and July 15, 1955, Tucker and Calkins again demanded to examine said pay roll records and pay roll checks. In compliance with said demand, the corporation again delivered and made available to Tucker and Calkins the pay roll records and checks.

Mr. McHale: So stipulated.

Mr. Brant: Now, directing our attention to the third and separate defense in paragraph III thereof, it is stipulated that a joint income tax return of Clifford O. Boren and Delta M. Boren for the calendar year 1950 was made and filed on or prior to

March 15, 1951. In the month of January 1954, Clifford O. Boren and Delta M. Boren signed a waiver of the Statute of Limitations for the calendar year 1950, which waiver extended the time for assessment of a deficiency to June 30, 1955.

Mr. McHale: So stipulated.

Mr. Brant: In connection with paragraph IV, under date of March 11, 1955, the Commissioner issued his Notice of Deficiency to Clifford O. Boren and Delta M. Boren for the [30] taxable year 1950.

Mr. McHale: So stipulated.

Mr. Brant: Paragraph V, on June 6, 1955, Clifford O. Boren and Delta M. Boren filed with the Tax Court of the United States a petition for redetermination of their tax liability for the taxable year 1950.

Mr. McHale: So stipulated.

Mr. Brant: Paragraph VI, Clifford O. Boren and Delta M. Boren, and each of them, made and filed income tax returns for the calendar year 1951 on or prior to March 15, 1952.

Mr. McHale: So stipulated.

Mr. Brant: Paragraph VII, under date of March 11, 1955, the Commissioner issued Notices of Deficiencies for Clifford O. Boren and Delta M. Boren for the taxable year 1951.

Mr. McHale: So stipulated.

Mr. Brant: Paragraph VIII, on or about July 22, 1955, the Commissioner assessed against Clifford O. Boren and Delta M. Boren the taxes, interest and penalties proposed to be assessed in said Notices of Deficiencies. There are attached hereto

marked Exhibit "A" and Exhibit "B" true copies of the Statement of Income Tax Due for Clifford O. Boren and Delta M. Boren, showing said assessments. Delta M. Boren has paid the taxes, interest and penalties demanded in said statement. [31]

Mr. McHale: So stipulated.

Mr. Brant: In connection with the fifth and separate defense, page 6 of the answer, it is stipulated—and also in connection with paragraph II—it is stipulated that on July 20, 1955, petitioner Tucker demanded to examine the pay roll records and checks of the corporation. Said records and checks have been examined by both Tucker and Calkins throughout the period of examination and had repeatedly been made available to Tucker and Calkins.

Mr. McHale: So stipulated.

In connection with the sixth and separate defense on page 7, paragraph II thereof, it is stipulated that none of the respondents have requested a re-examination of the corporation's books of account. Neither the Secretary of the Treasury nor his delegate, after investigation, has notified the corporation in writing that an additional inspection is necessary.

Mr. McHale: So stipulated.

Mr. Brant: I believe that is the extent of our stipulations, your Honor.

The Court: Very well.

Anything further on behalf of the petitioner?

Mr. Brant: If the court please, I am informed by Mr. Strang that I erred in one stipulation in

connection with Mr. Ford's resignation. I am told that I stated 1955 instead of 1954. [32]

Mr. McHale: I am sure it wasn't 1955.

The Court: The answer states 1955. The answer alleges 1955.

Mr. Brant: That is incorrect, your Honor. It was September 10, 1954. Is that not correct?

Mr. McHale: Yes.

The Court: That is in the last sentence of paragraph V on page 3 of the answer filed November 10, 1955. You may make the correction on the face of the original by interlineation, if you so desire.

Mr. McHale: Yes, your Honor.

Mr. Brant: Yes, your Honor.

The Court: And initial it and place the date in the margin. 1954 is the agreed date.

Mr. McHale: Agreed, your Honor.

The Court: September 10, 1954 is the agreed date of the resignation of Agent Charles D. Ford.

Mr. McHale: That is correct, your Honor.

Mr. Brant: One stipulation further, your Honor: I believe counsel is agreed that the affidavit which I signed and which has been filed with the court should be before the court in the same manner as Mr. Tucker's affidavits are before the court. That is, I would so testify if called and placed on the witness stand under oath.

Mr. McHale: Reserving objections to the materiality and relevancy. [33]

The Court: You may move to strike.

Mr. McHale: That is what I mean, your Honor,



move to strike; and, also, any particular evidentiary grounds, conclusions and so forth.

The Court: The affidavit, subject to a motion to strike, will be received as Respondents' Exhibit B. That is the affidavit of John A. Brant filed December 5, 1955, and verified the same day.

(The exhibit referred to was marked Respondents' Exhibit B, and was received in evidence.)

[See pages 41-45.]

Mr. McHale: Well, this comes after the evidence, but I suppose some sort of an opening statement should be made here with respect to the nature of this proceeding.

The Court: I have been over the file.

Mr. McHale: Your Honor understands then that the principal issue here—and I think counsel would agree with this—the principal issue here is the Government's right to examine and photograph or reproduce the pay roll checks and look further into the pay roll records for the reason that—on the grounds I believe there is positive indications of fraud. And upon the evidence that has been presented in the record I urge that we have sustained our burden here and that the respondents should be ordered to produce the pay roll checks and records. [34]

The Court: Is there anything further on behalf of the petitioner?

Mr. McHale: Nothing further.

The Court: Do the respondents wish to cross examine Mr. Tucker?



Mr. McHale: There is one thing I wanted to say, your Honor: The Government believes that these separate defenses are wholly irrelevant to the issues here, and we move to strike the separate defenses.

The Court: All of them?

Mr. McHale: All of them, your Honor.

The Court: What defense would the Government conceive of as being available to the respondents in a proceeding such as this?

Mr. McHale: If, your Honor, an examination had been commenced of the taxpayers, that is Clifford O. Boren and Delta M. Boren, brought to fruition, altered and ended completely, then it might be considered that under certain sections of the Internal Revenue Code to re-examine the tax liability of the Borens individually, the Commissioner would have to send them notice. But we maintain that the evidence clearly shows that this is a continuing investigation, that later items of particular fraud had been brought to light, that the investigation never terminated—a continuing investigation. [35]

Furthermore, this is a proceeding against the corporation and Delta Boren and Clifford Boren as officers of the corporation—really a third party—to produce the books and records of the third party; and a defense like that, we maintain, wouldn't be available in the first instance. Most of the——

The Court: Well, let's get the evidence now, the record as to the evidence straight. Is the petitioner now resting?

Mr. McHale: Resting, your Honor.

The Court: Before the petitioner rests, do the respondents desire to cross examine the petitioner on his direct evidence?

Mr. Brant: On his direct testimony, no, your Honor. We may desire to call him under the appropriate rule of the Rules of Civil Procedure and Rule 43(b). We may desire to call him under that rule. But we do not desire to cross examine him at this time.

The Court: Very well. The court will reserve a ruling on the petitioner's motion to strike the separate defenses set forth in the respondents' answer to the petition.

The respondents may proceed now. Is there any further evidence to be offered on behalf of the respondents?

Mr. Brant: Yes, your Honor. I would like to call Mr. Lloyd M. Tucker for a very few questions.

The Court: You may. [36]

#### LLOYD M. TUCKER

called as a witness on behalf of the respondents, being first sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Lloyd M. Tucker.

#### Direct Examination

Q. (By Mr. Brant): Mr. Tucker, you commenced your examination of the returns of Clifford O. Boren and Delta M. Boren on or about October 20, 1954, is that not correct?

(Testimony of Lloyd M. Tucker.)

A. That is correct, sir.

Q. Prior to that date you have not been engaged in the examination of these returns, have you?

A. That is correct.

Q. You were assigned to the examination on or about May 11, 1955, is that correct?

A. That is correct.

Q. On October 20, 1954 did you inform me, as attorney for Mr. and Mrs. Boren, that you intended to conduct a criminal investigation of their returns?

A. I told you that, sir; and I believe it was on that date. If it was not on that date it was on an immediate subsequent date.

Q. Prior to October 20, 1954 do you know whether or not Mr. Forrest Calkins was assigned to the examination of [37]

A. Yes, I am certain that he was.

Q. He was assigned prior to October 20, 1954?

A. Yes.

Mr. McHale: This is covered by the stipulation, your Honor, I think.

The Court: There may be some duplication but I would assume Mr. Brant is attempting to eliminate it wherever possible.

Mr. Brant: I certainly am, your Honor, and shall endeavor to do so.

Q. (By Mr. Brant): Prior to October 20, 1954, do you know whether or not Mr. Calkins was engaged in the examination of Mr. and Mrs. Boren's returns for 1950 and 1951?

A. I think he was not, sir.

(Testimony of Lloyd M. Tucker.)

Q. Do you know, Mr. Tucker, who, if anyone, was engaged in the examination of Mr. and Mrs. Boren's returns prior to October 20, 1954?

A. Yes, I do.

Q. Who were those persons?

A. Henry Miller, an Internal Revenue agent; and Charles D. Ford, who was an Internal Revenue agent at that time.

Q. On October 20, 1954 did you have any official reports of either Mr. Miller or Mr. Ford in your possession; or had you examined any such reports?

A. Yes, I had examined such reports. I recall that I didn't have any papers belonging to or which had been prepared by Mr. Miller.

Q. You did have—pardon me. Go right ahead.

A. And with respect to Mr. Ford, I am certain that I had some memoranda of some type, which I don't presently recall, which had been prepared by him.

Q. And you determined on the basis of this information that you had coming from Mr. Ford to make a criminal investigation of these returns, is that correct?

A. Primarily on the information obtained by Mr. Miller.

Q. But you had no memoranda or any official information as to what Mr. Miller had determined in his examination?      A. Oh, yes, I did.

Q. I thought you testified a moment ago that you did not.

A. What was your question again?

(Testimony of Lloyd M. Tucker.)

Q. Did you have on October 20, 1954 when you commenced the examination, any official records or memoranda of any kind prepared by Mr. Miller in connection with the examination?

A. No, I did not have it in my possession. I had seen them.

Q. You had examined them?

A. Yes. [39]

Q. Mr. Tucker, in the affidavit which you have filed in this proceeding you refer to a certain employee and pay roll checks of this employee. Is this employee a person by the name of Beverly Knapp?

Mr. McHale: Your Honor, I think this matter is confidential and not within the scope of this examination. After all, this is a proceeding investigation and the agent has made his affidavit to the effect that there was such an employee, but I don't think it should be disclosed in this proceeding the source or just the particulars with respect to the employee. We have made this disclosure thus far but I think there should be a limit on the character of the information to be given here.

The Court: Is your objection that it is immaterial?

Mr. McHale: I believe it is immaterial.

The Court: What is the pending question, Mr. Reporter?

(Question read.)

The Court: Would it be material?

Mr. Brant: Yes, your Honor; and I may state its materiality in this manner: One of our primary



(Testimony of Lloyd M. Tucker.)

contentions in opposing the summonses is that Mr. Tucker has examined not once but several times the particular checks and records which he now seeks to again examine under the summonses. And also that there has been a determination of tax liability of all three respondents predicated upon [40] information supplied by Mr. Tucker in his official reports.

The Court: Why don't you ask him if he hasn't examined these checks, all of them, whatever is covered, without asking the name of the person, or the employee?

Mr. Brant: All right.

The Court: Sustained.

Q. (By Mr. Brant): Mr. Tucker, you have examined all of the pay roll checks of the Clifford O. Boren Contracting Company for the period July 1, 1951 to December 31, 1951, have you not?

A. I haven't examined all of them.

Q. Were all of these checks made available to you?

A. As far as I know they were all in your office.

The Court: You had full opportunity to make a complete examination of them previously?

The Witness: Yes, your Honor. They were all there as far as I know.

Q. (By Mr. Brant): Did you have more than one opportunity to examine them, Mr. Tucker?

A. Yes. I had two opportunities.

Q. You specifically requested the check on two different occasions, did you not?



(Testimony of Lloyd M. Tucker.)

A. That is correct, sir.

Q. And they were supplied to you on two different occasions, were they not? [41]

A. That is right.

Q. During the conduct of the examination by you and Mr. Calkins—that is, between the period October 20, 1954 and July 15, 1955—you and Mr. Calkins jointly conducted the examination of the records of the Clifford O. Boren Contracting Company, did you not? A. Yes, that is correct.

Q. All of your examinations were joint, is that not correct? A. Yes, that is true.

Q. Would you estimate, Mr. Tucker, the approximate percentage of your time which was devoted to the examination of these records? That is, when you were present in my office and had the records available. Approximately how much of your time was actually devoted to the examination of the available books and records?

A. Well, that's difficult to state, but I would be glad to state that it was far less than that expended by Mr. Calkins. And I would be glad to explain why.

Q. A small amount of your time was devoted to the examination of the records, is that not correct?

A. Yes, a small amount.

Q. Is it true, Mr. Tucker, that the only records which you in fact desire to examine are the pay roll checks and pay roll records of the contracting company? [42]

A. Yes, those records that would relate in any

(Testimony of Lloyd M. Tucker.)

manner to the pay roll checks, which would be the pay roll records and the checks themselves.

The Court: Do you mean by that answer to withdraw from any portion of the records requested in the subpoena?

The Witness: What is that, sir?

The Court: Do you mean to waive or withdraw the requests for the production of any records specified in the subpoena?

The Witness: No, your Honor. As I recall—

The Court: Then your answer must be, I take it, that you wish to examine all the records specified in the subpoena.

The Witness: That is correct, sir. As I recall—I don't recall exactly what the subpoena said, but all of those records requested would relate in some manner to the checks themselves.

The Court: Or enable you to trace them through the records.

The Witness: That is correct, sir.

Q. (By Mr. Brant): Mr. Tucker, did you state to your attorney, Mr. McHale, that if you were permitted to examine the payroll checks of the contracting company for this period and to have photostatic copies of those checks made that it would be unnecessary to make any further investigation by you of the books and records of the Clifford O. Boren Contracting Company? [43]

A. Well, I can't remember the statement *per se*. If you could refresh my memory as to—

(Testimony of Lloyd M. Tucker.)

Q. Have you ever made such a statement to your counsel?

Mr. McHale: I am going to object to this as being within the attorney-client privilege.

Q. (By Mr. Brant): Have you ever, Mr. Tucker, made a statement——

The Court: I will overrule the objection.

Mr. Brant: Oh, I am sorry.

The Court: It now doesn't appear it was anything confidential. The circumstances don't appear to be confidential. And the witness may claim the privilege, I take it; not the attorney.

The Witness: Will you repeat the question, please?

The Court: I assume he could change his mind, couldn't he? The question here——

Mr. McHale: I think it's immaterial and irrelevant anyway, your Honor. The question here is what he wants at this time and place.

Mr. Brant: Your Honor, in a case of this type it is the burden of the petitioner to show that there is a necessity for the examination.

The Court: That is what I was getting at. Now, is it the purport of your question that he has admitted on some prior occasion that only the cancelled checks were necessary? [44]

Mr. Brant: That is correct.

The Court: You may ask him that.

Answer the question.

The Witness: The only answer I can give to it is that I don't recall making the statement. But if

(Testimony of Lloyd M. Tucker.)

you would enlighten upon your question I would be pleased to try to recall if I did.

Q. (By Mr. Brant): You are acquainted with Mr. Charles D. Ford, Mr. Tucker?

A. Yes, sir.

Q. Do you know whether or not the Special Intelligence Service of the Treasury Dpartment is presently conducting an investigation of the activities of Charles Ford in connection with the examination of the returns of Clifford O. Boren and Delta M. Boren for 1950 and 1951?

Mr. McHale: Your Honor, I believe this question is utterly immaterial and irrelevant.

The Court: What is the purpose of it, Mr. Brant?

Mr. Brant: Your Honor, I feel that the background—we have been in several different proceedings. We have been accused of coming into court without clean hands. And I want to demonstrate that my clients do have clean hands.

The Court: Well, there is no suggestion of that here today that I have heard.

Mr. Brant: I think that is important. [45] And also the purpose for the examination being conducted by Mr. Tucker and Mr. Calkins, I think, is important.

The Court: Well, I understood that the witness admitted that he was conducting it for purposes of investigating possible criminal prosecution.

Mr. Brant: That is correct.

(Testimony of Lloyd M. Tucker.)

The Court: Now do you wish to prove any more than that?

Mr. Brant: We are concerning ourselves somewhat with the question of abuse of authority under this section, your Honor. And I think that we are entitled to inquire as to motive or possible motive, or facts from which an inference of motive might be made.

The Court: Why don't you ask him that? Ask him about motive. The fact that an investigation is being conducted——

Mr. Brant: I seriously doubt, your Honor—pardon me.

The Court: Probably I don't get the purport of the question. I don't see that it has any bearing. They might have three or four different investigations going on. Is this an investigation about Ford?

Mr. Brant: Yes, your Honor.

The Court: Well, let's assume the worst. Would it matter here?

Mr. Brant: Only from inferences which might be——

The Court: Let's assume that some agent of the Government attempted to extort money from these taxpayers. Would that affect this situation? [46]

Mr. Brant: I think it would in connection with the necessity of the examination, your Honor; and the fact that the examination has been conducted over a long period of time of these taxpayers; and the necessity for the re-examination and possible motives for that re-examination.



(Testimony of Lloyd M. Tucker.)

The Court: Well, if it is a question of good faith—I don't know how we could try the issue of good faith. That's wrapped up in the question of necessity, isn't it?

Mr. Brant: That is correct.

The Court: If the examination is reasonably necessary to the performance of official duty—I suppose that would be the ultimate issue, would it not?

Mr. Brant: Yes, your Honor. I will withdraw the question, your Honor.

The Court: Very well.

Q. (By Mr. Brant): Mr. Tucker, are you acquainted with the notices of deficiency which have been issued by the Commissioner of Internal Revenue under date of March 11, 1955, issued to Clifford O. Boren and Delta M. Boren for the years 1950 and 1951?

A. I am to some extent. The issuance of those notices is not a function of my office. But, generally, I am acquainted with what were issued.

Q. Do you know whether or not they were issued based upon information supplied by you, [47] to any extent?

A. Yes, I know whether they were or not.

Q. Would you say entirely supplied by you or only partially?

A. I would say that generally they were based upon the audit conducted by Mr. Calkins, and in some respects from information which I obtained in the investigation together with Mr. Calkins.



(Testimony of Lloyd M. Tucker.)

Q. Now, the audit that you mentioned, the audit of Mr. Calkins you are referring to is the joint audit made by you and Mr. Calkins?

A. Yes.

Q. Are you familiar, Mr. Tucker, with the notice of proposed deficiency issued by the Commissioner of Internal Revenue to the Clifford O. Boren Contracting Co., Inc., under date of July 15, 1955 for the fiscal year July 1, 1951 to April 30, 1952?

Mr. McHale: I object to that, your Honor. This investigation is with respect to the tax liability of Clifford O. Boren and Delta M. Boren, and the corporation is not involved, except as a witness here, in this proceeding. The notices with respect to the corporation would have no bearing in this proceeding.

Mr. Brant: Perhaps, your Honor, counsel may be right. What I am getting at is that the pay roll checks and records—the pay roll checks [48] that he now seeks have been disallowed as a deduction on behalf of the corporation; and he has also disallowed similar pay roll items for the year 1951 in connection with the individual return.

The Court: Why don't you ask him?

Mr. Brant: I am asking him in this manner to establish some foundation for that later question.

The Court: I think you might as well put the question to him direct in this proceeding.

Q. (By Mr. Brant): Mr. Tucker, do you know whether or not the deductions claimed by Clifford

(Testimony of Lloyd M. Tucker.)

O. Boren or Delta M. Boren for the year 1951, the deductions claimed for salaries and wages, were disallowed in whole or in part by the notice of proposed deficiency?      A. In part, yes.

Q. They were disallowed in part?

A. Yes.

Q. Was this disallowance, in part, based upon information obtained by you in the examination of the pay roll records and checks?      A. It was.

Q. Since that time that you supplied that information, Mr. Tucker, have you obtained any other information showing that any other particular pay roll checks or deductions should be disallowed for the year 1951? [49]

A. No, not since that time.

Mr. Brant: No further questions, your Honor.

#### Cross Examination

Q. (By Mr. McHale): Mr. Tucker, you were asked, in the joint examination of books and records of the corporation made in connection with the tax liability of Delta and Clifford Boren, as to the percentage of time you spent in Mr. Brant's office, I believe with Mr. Calkins, in examining those records, and I believe you testified that you spent a much smaller amount of time than Mr. Calkins did. Will you explain your answer and the reasons?

A. Yes, I will try to do that. All the time that was expended by Mr. Calkins and myself in this examination was spent in Mr. Brant's office. The books and records were there, and he required that

(Testimony of Lloyd M. Tucker.)

we make the examination in his office and in his presence.

Now, in that office Mr. Brant had his desk and from the front of his desk there was a small shelf which could be pulled out from the desk. As I recall, it may have been 20 inches by 20 inches. And that was the only space that was provided us in which to work. Now, repeatedly on several occasions we asked Mr. Brant if he would provide us with other space. We told him that this space was **not** adequate. We asked him if he could use the library in his office where we could both [50] work together and spread out the books and papers on which we were working. And his reply to that was always some type of a joke to the effect that "Where could you be more comfortable than this? Where could you find better coffee to drink? Where could you find air conditioning like this?" And he never would provide us with any further space to work.

Now, at the time that I examined these pay roll checks and the records that I did examine, I balanced them on my lap, made piles of them on the floor; I wrote on my knee. And Calkins at that time was using various books, heavy ledgers, journals; he had work papers spread before him. He had the books on the floor part of the time. Some of them he had on his lap. Some of them he put on the little shelf that I referred to. And he was continually either looking on the floor or on the shelf or on his lap trying to reconcile these papers and conduct an audit in that fashion.

(Testimony of Lloyd M. Tucker.)

Q. And Mr. Brant was in the offices or sharing offices or associated with the firm of Torrance & Wansley? A. Yes.

Q. And they had how many offices, and what space, would you say?

A. Well, it's a large suite. I am not certain that I know how many rooms there are. I think that there are four individual offices—perhaps five—plus a reception room. [51] And this library that I referred to is across the hall from Mr. Brant's office—or, that is, across the hall from the firm. I never entered the room. I don't know how big it was.

Q. Mr. Brant then required you to conduct the investigation as best you could in his office in his presence, is that correct?

A. That is correct.

Q. Did Mr. Brant ever deliver to you outside of his custody, that is let you take from his office any of the books, records or checks of the Clifford O. Boren Contracting Company?

A. No, he never did.

Q. And it is your principal purpose in this examination, Mr. Tucker, is it not, to photograph or photostat certain of the pay roll checks to determine the validity of the endorsements on those checks, and whether there have been forgeries of those checks? A. That is correct.

Q. But you have been denied access to those checks—that is, to take them out and have them photographed or photostated, is that correct?

(Testimony of Lloyd M. Tucker.)

A. That is correct.

Q. Now, with respect to the notices of deficiency against Clifford O. Boren and Delta M. Boren [52] for the years 1950 and 1951, it is true, isn't it, Mr. Tucker, that the notices of deficiency had to be sent out in June 1955 because the taxpayers would not execute further waivers of the statute of limitations? A. Yes, that's right.

Q. And the same is true with respect to the corporation? A. That is correct.

Mr. McHale: That's all.

#### Redirect Examination

Q. (By Mr. Brant): Mr. Tucker, those notices of deficiency were not sent out in June 1955 when the statute as extended voluntarily by the taxpayers were extended, but were in fact sent out in March 1955, is that not correct?

A. Some of them were.

Q. Isn't it the fact, Mr. Tucker, that the affidavit which is referred to in your affidavit which was filed in this court in this proceeding, this employee's affidavit, is it not the fact that that affidavit was obtained on March 16, 1955?

A. Are you referring to—

Mr. McHale: Which affidavit?

Mr. Brant: The employee's affidavit referred to in Mr. Tucker's affidavit. [53]

Q. (By Mr. Brant): And prior to July 15, 1955, when you completed your examination of the corporate return?



(Testimony of Lloyd M. Tucker.)

A. I can say this, that it was prior to July 15th. But without referring to certain records which I have on the bench there——

Mr. Brant: Would you make reference to those records. I think it is important that we have the date of that affidavit.

Or is that within our stipulation, counsel?

Mr. McHale: I think it might be.

Mr. Brant: I think it is.

As I recall it, it is within the stipulation and I withdraw the question.

The Court: The stipulation as to when the witness first learned, when the petitioner first learned——

Mr. Brant: About this employee's affidavit. He refers to an employee's affidavit, and in the affidavit which I filed I recite, "I have examined the affidavit——" as I recall—"I have examined the affidavit and it bears the date March 16, 1955." Will you confirm that, counsel? If it is, I will withdraw the question.

Mr. McHale: I think that is correct. I can't find it offhand.

The Court: That's the means whereby the petitioner learned of the alleged fraud? [54]

Mr. McHale: Yes, it is March 15, 1955.

The Court: That is the means whereby the petitioner learned of the facts which give rise to the necessity of the re-examination of the pay rolls here?

Mr. Brant: That's correct. And also the fact that he had examined, did examine them after that



(Testimony of Lloyd M. Tucker.)

date. That is the date that becomes important for that reason.

Q. (By Mr. Brant): Mr. Tucker, my desk is pretty large, isn't it?

The Court: You don't need to go into that.

The Witness: Yes.

Mr. McHale: That's an ambiguous——

Mr. Brant: I want to point out that he had available to him——

The Court: Some taxpayers make the examiners very comfortable and others make them very uncomfortable. That's all a part of their work.

Mr. Brant: I don't think Mr. Tucker would deny that he was made comfortable.

Q. (By Mr. Brant): Is that not the fact, Mr. Tucker?

A. Well, it depends on what you mean by that, Mr. Brant.

Q. Did you ever request of me, Mr. Tucker, to take any of these books and records out of the office?

The Court: There is no complaint here about past examination, is there. These things don't turn upon social niceties, as I see it. [55] The agent uses the power, if he wants to,——

Mr. Brant: That is correct.

The Court: ——that the law gives me whether the taxpayer is agreeable about it or not.

Q. (By Mr. Brant): Mr. Tucker, in issuing the three summonses which you have issued and which are the basis for your present action, was one of

(Testimony of Lloyd M. Tucker.)

the purposes that you had in mind at that time assisting in any manner the preparation of a criminal case against Clifford O. Boren and Delta M. Boren in connection with their returns for 1950 and 1951?      A. Yes, it was.

Q. Mr. Tucker, do you have in your possession here in court the notes and transcripts which you made from the books and records supplied by the Clifford O. Boren Contracting Company in connection with the pay roll checks?

A. Yes, sir, I do.

Q. Would you permit me to examine them, please?

Mr. McHale: I object to this, your Honor. This is confidential. This is a matter garnered by the agent in his investigation. It is not relevant or material to any part of the inquiry here.

The Court: What would be the purpose of it?

Mr. Brant: Your Honor, I wish to demonstrate by the notes and transcripts which Mr. Tucker [56] made of the taxpayer's books and records, I wish to demonstrate in part the nature and extent and scope of his prior examination of these records, and to demonstrate that his present examination is not necessary.

And on the issue of privilege I call to the court's attention that the notes and transcripts which I have asked him for are information which he obtained from the taxpayer's books and records, so they could hardly claim confidential privilege on those.

(Testimony of Lloyd M. Tucker.)

The Court: Well, I am not interested in claims of confidential privilege. I am interested in the claim of materiality. As I understand it, what the petitioner here wants is to have photostatic copies of these endorsements and, I assume, to submit them to handwriting experts with exemplars to determine whether or not the people who allegedly endorsed the checks did in fact endorse the checks. That is my understanding of it. And my understanding of it, as a matter of common knowledge, I assume, though I would want to ask him that, the other documents desired are for the purpose of auditing, in a sense tracing the carrying of these checks through the records of the company to see whether, for example, they were in fact charged to the salary account and so forth—pay roll.

Mr. Brant: Of course that is absolutely true, your Honor. He is directing himself specifically as to desiring these [57] photostats. But my burden must necessarily be broader than that. I must attack his entire examination to show that it itself is unnecessary. My question was directed to that, your Honor.

The Court: If he had them twice available the burden is on the petitioner to show a necessity for a third examination.

Mr. Brant: That's right. I will withdraw——

The Court: Now, if he has made photostatic copies he has this information. If you want to show that, why,——

Mr. Brant: I do desire to know the nature of

(Testimony of Lloyd M. Tucker.)

the transcripts of information that he and his associate Mr. Calkins took from these books and records.

The Court: Do you contend that he had photostatic copies made?

Mr. Brant: I do not contend that he has photostatic copies, but I would speculate that he has copies of every bit of information on the checks. That is pure speculation.

The Court: Why don't you ask him that? We would invade his private papers, as we would yours, only as a last resort. Ask him if he doesn't have it. I would assume the same thing. He must have been doing something with them all the time he had them.

Q. (By Mr. Brant): Mr. Tucker, how much information did you extract from the pay roll checks of the Clifford O. Boren [58] Contracting Company? Would you tell us generally what information you took off the checks?

A. Well, in answering that question I would have to restrict it to only the checks that I examined and only as to those checks from which I did extract information.

Q. All right. What information did you extract?

A. All right. From certain checks I extracted the date of the check, the name of the payee of the check, the bank endorsement of the check, and the names of the individuals appearing on the reverse side of the check.

(Testimony of Lloyd M. Tucker.)

Q. Was there any other information on that check?

A. Excuse me. The amount, of course.

Q. Sir? A. The amount, of course.

Q. Was there any other information on the checks that you examined other than what you have obtained? The check that you were just referring to. What other information would there be on the check? A. Oh, the name of the bank.

Q. Did you obtain the name of the bank?

A. No, I didn't.

Q. You never obtained the name of the bank upon which the check was drawn?

The Court: Do you mean did he make a note of it?

The Witness: Well, the bank account——

Q. (By Mr. Brant): Do you know the bank on which these checks were drawn?

A. Yes, I am certain that I do. There were several bank accounts, but as I recall these were drawn on the Bank of America at North Park in San Diego.

Mr. Brant: I have no further questions, your Honor.

The Court: Mr. Clerk, would you place the subpoena in front of the witness.

(Whereupon the document was placed before the witness.)

The Court: I notice, Mr. Tucker, that the subpoena calls for, I believe, five classifications of



(Testimony of Lloyd M. Tucker.)

documents. One is the daily journal. The second is the cash journal. The third is the general ledger. The fourth is the pay roll records. And the fifth is the pay roll checks. I have heard quite a bit said as to the necessity of the production of pay roll checks, but what is the basis for the necessity of the production of the other four items?

The Witness: Well, it would be this, your Honor: to ascertain definitely that any particular check was in fact charged in the records of the company. And that check should then be charged—I mean should be traced into the pay roll record and then from the pay roll record, which is only a subsidiary record, into the general records of the company for the purpose of determining to a finality if that check or like checks were actually charged to expense. [60]

The Court: How would the cash journal be involved, or the general journal?

The Witness: I couldn't say, sir, what these particular records—the cash journal would reflect the disbursements and receipts of cash.

The Court: These are checks, and I would assume they would be charged directly from the pay roll ledger, or whatever the pay roll record is, directly to some general ledger account, some general ledger expense account, without going through the general journal or the cash journal.

The Witness: Yes.

The Court: I was trying to think of some con-



(Testimony of Lloyd M. Tucker.)

tingency that would make the cash journal or even the general journal necessary.

The Witness: Well, Mr. Calkins would be far better qualified to answer that particular question because he has examined those records in far more detail than I have.

The Court: Very well. Would you want to call Mr. Calkins?

Mr. McHale: I think Mr. Calkins could answer that question better.

The Court: Are there any further questions of Mr. Tucker?

Mr. McHale: Yes. I have one further question, your Honor, with respect to the last series of [61] questions.

#### Recross Examination

Q. (By Mr. McHale): Mr. Tucker, isn't it true that notices of deficiency are issued by the Commissioner of Internal Revenue?

A. Yes, that is correct.

Q. And if the statute of limitations were running, say, in June of a year, the recommendations would have to be made several months before that by the agent in the field so proper processing could be made to various departments of the Internal Revenue Service.

A. They would have to be made in advance.

Mr. McHale: That's all.

The Court: Mr. Tucker, did you have the knowledge of the facts in this employee's affidavit as

(Testimony of Lloyd M. Tucker.)

early as March, and you did not terminate your examination until July?

The Witness: We first examined the checks for the first time in February and based on certain information obtained from those checks we conducted further investigation in that particular regard. And then it was in March—counsel said on March 16th, and that sounds correct—that we obtained certain testimony with respect to the certain pay roll checks which at that time then made it apparent to us that further investigation along those lines would be needed.

Now, between March and July when we again requested those checks, without referring to my records I can't say [62] what happened. I do know that I was out of the state for a period of weeks. And as I recall, Mr. Brant was ill for some time. And the delay was occasioned by Mr. Brant not being available or Mr. Calkins not being available or myself. I was gone for some six weeks.

The Court: When did you complete your second resort to the pay roll checks, your second examination, now?

Mr. McHale: Your Honor, it wasn't completed. The stipulation which was read here today was the fact that in July they asked again to see these checks and were refused. And this action, the issuance of the subpoena took place, I think, as a consequence thereof.

Mr. Brant: I must correct that statement, counsel. On July 11, 1955—and this was our stipula-

(Testimony of Lloyd M. Tucker.)

tion—Mr. Tucker requested all the payroll checks and payroll records on July 13, 1955. I delivered to Mr. Tucker and Mr. Calkins the pay roll records and pay roll checks that are now being sought. And that is our stipulation, if you will refer back.

The Court: How long did they have them after that?

Mr. Brant: I delivered them to them and they stated that they wanted copies of them, and I informed them that I could not consent to their being permitted to make copies at that time; and as I recall Mr. Tucker and Mr. Calkins stated to me, well, they didn't need to examine them then.

The Court: Now when last before that had [63] the agents had possession of the pay roll checks?

Mr. Brant: I couldn't particularize a date, your Honor, for this reason: They were brought in about February of 1955, they were brought into my office and remained there for a considerable period of time; and they were making examinations.

Now, I do know on several days they devoted themselves almost exclusively to the examination of the checks and the pay roll records and the supporting ledgers. I cannot particularize the exact date, your Honor.

The Court: Will the Government accept counsel's statement as testimony, as supplementing his affidavit?

Mr. McHale: As supplementing his affidavit, yes, your Honor.

Mr. Brant has said that possession was given of

(Testimony of Lloyd M. Tucker.)

these checks. Just to clarify—and I think you testified as to this before—but isn't it true that you were never given outright possession of these checks; you were only permitted to examine them in the offices of Mr. Brant? You were never permitted to take them outside or copy or photostat them?

The Witness: That is correct.

Mr. McHale: And that this examination and the tax liability of Delta Boren and Clifford Boren with respect to either criminal or civil fraud is still continuing and has not terminated? [64]

The Witness: That is true.

Mr. McHale: And you made demand in July for the checks to copy or photostat and that has been refused and been refused since, is that correct?

The Witness: That is correct.

Mr. McHale: That is all, your Honor.

The Court: Anything further, Mr. Brant?

Mr. Brant: Nothing further from this witness, your Honor.

The Court: Very well. You may step down, Mr. Tucker.

(Witness excused.)

The Court: Does the petitioner wish to call Mr. Calkins? Oh, the respondents are proceeding now.

Mr. Brant: I hadn't felt it necessary to call Mr. Calkins. Well, yes, I will call Mr. Calkins, please.

The Clerk: State your name, please.

FORREST P. CALKINS

called as a witness on behalf of the respondents, being first sworn, was examined and testified as follows:

The Witness: Forrest P. Calkins.

Direct Examination

Q. (By Mr. Brant): Mr. Calkins, you have examined the pay roll checks and pay roll records of the Clifford O. Boren Contracting Company for the period July 1, 1951 to December 31, 1951, have you not? [65]

A. Well, I have examined them in part, sir.

Q. You have made an examination of them, is that correct?

A. Of some of them, yes, sir.

Q. Have you examined the general ledger in connection with those checks, general ledger and pay roll account?

A. I believe I have, yes, sir.

Mr. Brant: No further questions, your Honor.

The Court: You may, of course, cross examine this witness. I assume you proceeded on that assumption, pursuant to Rule 43(b).

Cross Examination

Q. (By Mr. McHale): Mr. Calkins, I will show

(Testimony of Forrest P. Calkins.)

you the summons that was issued by Mr. Tucker, Exhibit A to the petition, and ask you how the cash journal would be involved in the matter of his pay roll checks. Notice that the cash journal is called for.

A. Well, the cash journal in the Clifford O. Boren Contracting Co. was a combined cash receipts and cash business, your Honor. The journal reflected both moneys received and disbursements of cash during the conduct of business. Therefore, to trace, say, any particular pay roll into the expense account it would be necessary to follow that check through the individual pay roll sheet into the pay roll reconciliation for the particular week or pay period onto the cash book, and [66] through that, the monthly posting into the expense ledger sheet.

Mr. McHale: Thank you.

The Court: Were the checks treated as cash?

The Witness: Well, we refer to cash, your Honor. It's cash or check. It's a disbursement of moneys.

The Court: Combined cash journal and check register?

The Witness: Yes, sir, it would be considered that.

The Court: How would the general journal be necessary to your examination, your further examination?

The Witness: Only in the event any adjustments were made through a general journal to the pay



(Testimony of Forrest P. Calkins.)

roll accounts or wages accounts; that is, either additions to that account or any reductions of the total expense to the——

The Court: General journal entries?

The Witness: Yes, usually correcting or adjusting entries.

The Court: Is there anything further of Mr. Calkins?

Redirect Examination

Q. (By Mr. Brant): Mr. Calkins, in making your examination of the payroll account of the Clifford O. Boren Contracting Co. for this period, did you examine the cash journal?

A. The cash journal? Yes, sir, I did.

Q. And did you examine the general journal?

A. Yes, sir, I did.

Q. And you have already testified you examined the general ledger, as I recall.

A. Yes, sir.

Mr. Brant: No further questions, your Honor.

Mr. McHale: That is all, your Honor.

The Court: You may step down, Mr. Calkins.

(Witness excused.)

Mr. Brant: Your Honor, at this time I would like to introduce into the evidence a letter bearing date of October 19, 1955, and signed by Mr. Edward R. McHale.

Mr. McHale: I object to the introduction of this, your Honor. This is irrelevant, incompetent and immaterial; and it was in an effort made between counsel at one time to settle this proceeding

by way of compromise—that is, to take certain of these records, photostat them under some method agreeable to both of us; and the letter was written by me, as counsel, to Mr. Brant, as counsel, with respect to a possible compromise of this matter.

The Court: Will you hand it to the clerk?

Mr. Brant: Yes, your Honor.

(Whereupon the document was handed to the court.)

The Court: The objection is overruled. It may be received as Respondents' Exhibit next in order.

The Clerk: That is C, your Honor. [68]

(The exhibit referred to, marked Respondents' Exhibit C, was received in evidence.)

### RESPONDENTS' EXHIBIT "C"

United States Department of Justice

United States Attorney, Southern District of California, 600 Federal Building, Los Angeles 12.

Address reply to United States Attorney and refer to initials and number ERMcHank Tax Division.

Torrance & Wansley  
Attorneys at Law

October 19, 1955

1216 Bank of America Bldg., San Diego 1, Calif.

Attention: John A. Brant, Esq.

Re: Lloyd M. Tucker, etc., vs. Clifford O. Boren  
Contracting Co., Inc., etc., et al., No.  
1780-SD Civil.

Dear Sirs:

With respect to your letter of October 12, 1955, we are in agreement with you that it would be to

the best interest of your clients and the Government to avoid further proceedings through the Courts with respect to the production of certain books and records of the Clifford O. Boren Contracting Co., Inc.

We would be agreeable to preparing such an order as you suggested in your letter of October 12, 1955, with respect to the payroll checks, which are the documents Mr. Tucker wishes to examine, providing that an opportunity be given the Government to reproduce the checks either photographically or through some photostatic process. We would be willing to stipulate that the copying be done either through the Clerk of the Court or an impartial commercial photographic or photostatic company, if you do not wish to entrust the checks to the custody of the Government for the purposes of copying only.

If this is agreeable to you, please advise us of the method of copying agreeable to you and we will prepare a stipulation and order to that effect. As we understand it, the copying of payroll checks, once accomplished, will make unnecessary any further investigation by Agent Tucker into the books and records of the Clifford O. Boren Contracting Co., Inc., and actions No. 1780-SD and No. 1774-SD may be dismissed by stipulation of counsel.

Very truly yours,

Laughlin E. Waters,  
United States Attorney  
/s/ Edward R. McHale,  
Assistant U. S. Attorney

Mr. Brant: The respondents now rest, your Honor.

The Court: Is there any rebuttal?

Mr. McHale: Yes, your Honor. With respect to this letter which has been received in evidence, I suppose there is nothing—since your Honor has admitted it into evidence—for me to do but to testify briefly with respect to the circumstances surrounding it.

The Court: Will the respondents accept Mr. McHale's recently made statement with respect to this letter as his testimony?

Mr. Brant: Yes, your Honor, certainly.

Mr. McHale: I think that will take care of it, your Honor.

The Court: Any further rebuttal? Does the petitioner rest?

Mr. McHale: Excuse me one moment, your Honor.

That is all. We rest, your Honor.

The Court: Both sides rest?

Mr. Brant: Yes, your Honor.

The Court: I will hear from the respondents.

Mr. Brant: Your Honor, the respondents object to the summonses on several grounds, a number of which have been alluded to here, but I would first generally like to state [69] the grounds and go into a more detailed consideration of them.

Section 7602 of the Internal Revenue Code of 1954, under which these summonses have been issued, authorizes an examination of a taxpayer's books—not necessarily "the" taxpayer's, but "a" tax-

payer's books—for the purpose of ascertaining a tax liability; and then certain other purposes are mentioned but they are not at issue at the present time. The section says,

“For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any Internal Revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of an Internal Revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—” to examine and to take testimony.

We submit first, your Honor, that the tax liability of Clifford O. Boren and Delta M. Boren has been ascertained. The Commissioner of Internal Revenue, in connection with the years 1950 and 1951, has made a determination of their tax liability, and as a matter of law that determination is *prima facie* correct. Not only has he made a determination of the tax liability but he has also disallowed salary deductions of Clifford O. Boren and Delta M. Boren and has [70] asserted a fraud penalty. The period of limitations as to the returns of Clifford O. Boren and Delta M. Boren for 1950 and 1951, and as a matter of fact, also for the contracting company for its fiscal year, have expired.

The statute under which these examinations are sought to be made, and particularly Section 7605(b), prohibits unnecessary examinations. The Section 7605(b) is headed “Restrictions on Examination of Taxpayer.” This section provides that “No tax-



payer shall be subjected to unnecessary examination or investigations, \* \* \*." That is the first provision of that section.

Now, we submit that the examination in this case is unnecessary. The books and records which they now seek to examine under these summonses were available to the present petitioner here. He did in fact make an examination of them. He didn't fully utilize the available opportunity which he had, but the records were made available to him. The primary records which he desires to examine are the pay roll checks and records, and they were made available to him on more than one occasion, and he has testified that he made notes and transcripts—rather detailed notes and transcripts, as I recall. And we submit that the examination, therefore, is unnecessary.

Also,—and I think this is borne out particularly by [71] Mr. Tucker's affidavit which has been filed in this case—the summonses that have been issued are unreasonable in scope.

Now, this is a third party examination. This is not an examination of the taxpayer whose tax liability is being investigated, as counsel has properly pointed out. They have examined these records most carefully. They know particularly and specifically what books and records they want. They want the pay roll checks of this employee. That is what they want. And I think you can read the affidavit which they have filed and that is just what they want, plus, in addition, if they happen to find something else from this examination, that would be fine. I



submit they know particularly and specifically the records which they want and they should be required to particularize those records in the summonses. They are not entitled to again make a broad sweeping examination as they seek to do under the present summonses.

And, also, I would like to point out again that Mr. Tucker had considerable opportunity to examine these records. They were available for a period of time running between October 20th of 1954 and July 15th of 1955, a rather considerable period of time. The particular times are contained in my affidavit. Mr. Tucker differs with me somewhat in his affidavit. But in all events he had a considerable period of time to devote himself, if he desires so to do, to the examination of these records. And he failed to do so, [72] apparently, and now seeks again to go through them.

The Court: Should the agent be required to think of all potentialities whenever he makes an examination?

Mr. Brant: Well, your Honor, I think the answer to that question is yes; and the answer to it is yes for this reason: Again referring back to this Section 7605(b), and I already mentioned to your Honor the first prohibition that a taxpayer should not be subjected to unreasonable examination, and then the second one goes on and says, “\* \* \* and only one inspection of a taxpayer’s books of account shall be made for each taxable year unless the taxpayer requests otherwise \* \* \*” and we have not requested that, as we stated in our stipulation—

“\* \* \* or unless the Secretary of his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.”

Now, the stipulation also demonstrates that these things have not been done. So we submit, your Honor——

The Court: The petitioner says here that he never did finish, that he finally went to you, as I understand it, and he had this idea—he was tardy, yes—but he had the idea that he had better photostat these endorsements, and you said no.

Mr. Brant: That is correct. He also has testified, [73] your Honor, that he has obtained no further information since the time that he did examine the checks. He had this affidavit that apparently caused him to be suspicious of the checks. He had this information when he made the examination—had them available, in all events on July 13th. They handed to him the pay roll records and checks as he had requested, and they were presented to him. Had he desired to examine them, why, his opportunity was there.

Of course, now what he is really after is the right to photostat them, and I am going to touch expressly on our views as to his right to photostat them. I am coming up to that point.

The Court: He just didn't think about this one angle, probably. The question, I suppose, is whether he should be required in one sitting to think of all the possibilities; or two sittings.

Mr. Brant: A notice of proposed deficiency was issued in behalf of the corporation. That is covered

in our stipulation. That has been done. That was done. On July 15th his examination stopped. The last day they examined the books and records of the corporation was July 15th. Prior to that time they were conducting this dual examination of the corporate books and records. And they had a number of sittings, I recall. I don't recall specifically the number of days they were there, but they were there for a considerable [74] number of days. We submit the taxpayers shouldn't be required to again subject themselves to an examination merely because the petitioner in this case didn't take advantage of the opportunity which he had. Of course,——

The Court: These are not the taxpayers' records.

Mr. Brant: The Code refers to "a taxpayer." And we submit, your Honor, that under the *Martin vs. Chandis Securities Co.* case in the Ninth Circuit—I have the citation——

The Court: It is in your memorandum?

Mr. Brant: Yes, sir. ——entitles a third party, a very similar situation as this, to make these objections which we are now making.

The Court: I don't suppose there would be any question about that. If anything, the third party should have more force to his objections from being harassed, at least. But I was just thinking of the rule that would require an agent to think of all the possibilities—to make his examination under the implied threat that he couldn't go back and take another look. Lawyers don't labor under that, do they?

Mr. Brant: We do, your Honor.

The Court: I would hate to think that you had to think of all the advisement the second a client came into the office.

Mr. Brant: But if I am faced with the statute of [75] limitations I had better get my complaint. And if a revenue agent doesn't complete his examination within the statutory period he is precluded from making an examination, unless he is prepared to take the affirmative burden of establishing fraud. That is my understanding.

The Court: Has the statute run?

Mr. Brant: Yes, as to all three, your Honor; with this caveat—and I might be anticipating Mr. McHale. In the notice of deficiency they have asserted a fraud penalty. In the petition they made the general assertion that they have reasonable grounds to believe that fraud was committed. If they have succeeded in establishing that probable cause then they have overcome our objection that the statute of limitations has run.

Mr. McHale: I think we have. That is our whole point here.

Mr. Brant: Perhaps they have. The statute has run, and they therefore have the affirmative burden, in order to make another examination, of establishing that probable cause. But even if they establish that probable cause to make the second examination they must of necessity comply with Section 7605(b) and get the Secretary of the Treasury or his delegate, after investigation, to certify in a written

notice that an additional examination is necessary; which they have not done.

Now, on the very interesting point as to whether or [76] not they are entitled to obtain photostatic copies of these records, the statute, your Honor, authorizes the Secretary of the Treasury or his delegate to examine. There is no authority that I have been able to find in Section 6702 that permits them to do anything more than examine. The words "to examine," according to my interpretation of it, indicates an inspection of some type of the records and would not indicate a right to make a seizure of these records. And we submit, your Honor, that a seizure is not authorized. On the pretext of making an examination they are not authorized to make a seizure of them.

Now, in the brief which we have filed I call the court's attention to U. S. vs. Krans, 270 F. 578 at 581. That was a District Court decision in which Judge Learned Hand when he was sitting in the District Court, stated in connection with an inspection authorized by the Volstead Act, "\* \* \* It is clear that the right to inspect (the records and papers) did not give the right to seize, and this is enough to require a return of the papers \* \* \*"

We submit, your Honor, that insisting upon photostatic copies is a seizure of these records just as much as if they took the actual records. We submit that is a seizure.

Now, I have also noted in our points and authorities two cases which appear to be contrary. One is U. S. vs. [77] Sherry, 294 F. 684. Well, that



case was a seizure that was made with consent or without objection. Here we are objecting.

Likewise, in *Sellmayer Packing Co. vs. Comm.*, a case that came up to the Circuit Court from the Tax Court, and concerned itself with some seized sales slips. The court pointed out that there had been no objection to the seized sales slips at the time of trial; the evidence was cumulative; and they had been able to establish there was an eminent possibility of these records being destroyed. They had a whole history of destroyed records and they had apparently been burned almost under the eyes of the revenue agents—almost that close to them. They knew it. They were able to establish that. And that is an important point. Counsel has stated two cases——

The Court: That would only go to probable cause.

Mr. Brant: That is correct. Counsel cited two cases on the same point. I would like to briefly mention them and then I hope not to further bother the court. In *Lisansky, et al. vs. United States*, 31 F.2d 846,—cited by counsel—at page 851, the court makes this statement which I feel distinguishes the case:

“There was no search or seizure of the books of defendant, nor was their production compelled by any legal process. On the contrary, the defendants voluntarily showed them to the Government agents and left them in their possession for auditing.”

The other citation is *Cooper vs. United States*, 9 F.2d 216 at page 220. The court there stated:

“Government officers, under the applicable rev-

venue law, demanded access to the books and papers of the corporation, in order to verify or discredit the returns it had made, and neither force, threats, nor other objectionable methods were employed. The corporation, without objection, answered and complied with the demand for inspection and examination and aided and participated therein."

The Court: Assume that this does constitute a seizure, or would constitute a seizure, the petition here is an affidavit here and if it shows probable cause the constitution requirements would be satisfied, would they not?

Mr. Brant: I think, your Honor, they would have to show probable cause for the commission of a crime in order to comply with Rule 41 of the Federal Rules of Criminal Procedure of this court, in order to get the search warrant and search and seize it. I submit if the Government wants to face that issue and seek a formal search warrant, that would be something entirely different. But they have not borne the burden of showing probable cause of the commission of a crime in order to justify a search warrant. I submit they have not done that in this matter.

The Court: Aren't you confusing two portions of the [79] Fourth Amendment? The first portion is the right of people to be secure in their houses, and then personal effects against unreasonable searches and seizure will not be violated. Isn't that what you rely upon here?

Mr. Brant: That is correct.

The Court: Now, the warrant for a search—

there is no warrant sought here for a search.

Mr. Brant: That is correct.

The Court: That would only be issued upon a showing of probable cause.

Mr. Brant: That is correct; a search or seizure.

The Court: But the question of reasonableness of a seizure here might turn upon probable cause to believe that what is being seized constitutes evidence of fraud in this case, or evidence of a crime.

Mr. Brant: That is correct, your Honor. They have no authority under this section to make a seizure. In the administration of the Internal Revenue laws if they want to make a seizure, Section 7607(b) of the Internal Revenue Code says, "For provisions relating to searches and seizures see Rule 41 of the Federal Rules of Criminal Procedure."

I submit that if they want to make a search their proper course is just as the statute directs, [80] "\* \* \* See Rule 41 of the Federal Rules of Criminal Procedure," and then proceed accordingly.

I submit, your Honor, that under the authority of Section 7602 they are limited. And this is the scope of their procedure: They are limited to making examinations, and not authorized to make a seizure.

Now, there is only one further point that I would like to make, which was outlined in our points and authorities, your Honor, and that is that they do not have the right—the Government does not have the right to use the administrative summons under this section for the purpose of investigating a possible criminal liability. And Mr. Tucker has

testified that at least one of his grounds for issuing the summonses here was for that very purpose.

The Court: For the purpose of——

Mr. Brant: For the purpose of investigating possible criminal liability rather than a civil tax liability.

The Court: How would that be material?

Mr. Brant: The code section says they are authorized to make an examination to determine the tax liability of a person. There is no mention of criminal liability.

The Court: What does the term “tax liability” comprehend? Does it comprehend the criminal as well as the civil aspect? [81]

Mr. Brant: Your Honor, I would say it would comprehend this, that it would comprehend the actual tax liability. And on the second point I am not quite sure. I think it would also encompass several fraud penalties but would not encompass criminal penalties or criminal sanctions or the investigation of possible criminal sanctions. And Mr. Tucker stated that one of the purposes in issuing these summonses was for the purpose of investigating a possible criminal case. In the decision of the United States vs. O'Connor, 118 F. Sup. 248, which I have mentioned in the memorandum, the court there states, “To encourage the use of administrative subpoenas as a device for compulsory disclosure of testimony to be used in presentments of criminal cases would diminish one of the fundamental guarantees of liberty.”

In that case it was also mentioned in testimony that one of the purposes was the investigation of a possible criminal liability. The court held here that they would not sanction that.

Thank you, your Honor.

Mr. McHale: May it please the court, with respect to this case of the United States vs. O'Connor, that is clearly distinguishable on its facts. The grand jury had returned an indictment and the holding of the court was they couldn't use this proceeding after the return of an indictment, [82] that it was then within the scope of the appropriation for the trial, if necessary, of grand jury subpoenas. But that is not the case here. This has not been presented to the grand jury for indictment. This is a continuing investigation of the tax liability of the Borens, Delta and Clifford Boren. The statute says, "\* \* \* for the purpose of ascertaining the correctness of any return." And that is what they are attempting to do here. And then it goes on to say, "\* \* \* and bears upon their tax liability."

That may mean civil fraud or it may mean there will be an indictment coming out of it having to do with the incorrectness of the return.

As I have tried to keep clear all through this proceeding, this is a proceeding by the special agent with respect to a third party, the corporation, Clifford O. Boren Contracting Co. The Borens are brought in only in their corporate capacities as such.

Judge Hall, in another proceeding which I have referred to in my brief, Tucker vs. Hubner—inci-



dentally that concerns another aspect of this investigation—stated,

“The respondent makes the point that the procedural requirements of 7605(b) were not complied with. The procedural requirements that a second or additional [83] examination of taxpayer’s books can be made only applies only to a second examination of the books of a taxpayer whose tax is in question.”

We are not saying this is the second examination, but merely pointing out what Judge Hall said in his opinion.

“They do not apply to a case, such as here, where the books are those of a third person (Hubner) and not the books of the one whose tax is in question (The Borens). In such case the sole question which can be raised is necessity for the examination under the Chandis case, *supra*. Obviously the ‘taxpayer’ referred to in Section 7605(b) is the one whose return is under investigation. It does not mean a third party who, as here, in the final analysis is merely a witness having in her possession evidence concerning the possible tax liability of some other person or persons.”

I believe that is recorded in 129 F. Supp. 110, and following, your Honor.

The special agent has filed a verified petition in which the only allegation that is denied in the main defense is this part of paragraph III:

“Petitioner has reasonable cause to believe that said taxpayers may have filed false or fraudulent returns with intent to evade the tax or may [84]

have willfully attempted to defeat or evade the taxes imposed by the Internal Revenue Code;" and paragraph XI,

"Respondents Delta M. Boren as Vice-President of the Clifford O. Boren Contracting Co., Inc., and Clifford O. Boren as President of the Clifford O. Boren Contracting Co., Inc., and the Clifford O. Boren Contracting Co., Inc., did each willfully and knowingly neglect and refuse to obey said summonses as required in that said respondents did appear at the time and place set forth in the summonses but did not produce said books, records, papers and data."

It is also denied in paragraph V that "Said books, records, papers and data contain therein entries relating to the business of the aforesaid Clifford O. Boren and Delta M. Boren; said books, records, papers and data are material and relevant to said inquiry."

Mr. Tucker has made his affidavit, and it has been brought out here today, that in March of 1955 of this year he learned that one of the employees carried on the pay rolls performed no services for the company or for the individuals in any respect; that said employee has denied under oath that she filed or caused to be filed the return such as was found reported income from the Clifford O. Boren Contracting Co.; and that, also, certain pay rolls checks issued to her were not endorsed by her, and these pay roll checks carried her endorsement.

And in the other affidavit which was introduced in the other action, the affidavit of Tucker, I be-

lieve he stated that they had evaded, or had cause to believe that there was an evasion of some \$40,000 in income taxes.

The Court: What do you say to this—you move to strike the respondents' second defense that the tax liability of Clifford O. Boren and Delta M. Boren for 1950-51 had been determined. If it had been determined would there be anything open?

Mr. McHale: The tax liability—that is, the civil tax liability, there has been a determination by the Commissioner because the statute of limitations ran. He had to make it or they would have gone free of any tax liability. However, there are two things. There is a six-year statute of limitations in a criminal prosecution. There is no statute of limitations on civil fraud. This investigation started with Tucker and Calkins last December 7th only; that is, just about a year ago, and it continued during January, February, March, through July, when this demand for these checks was finally refused and this summons had to be issued.

The Court: Isn't your answer to that [86] defense not to strike it but to say that it isn't true?

Mr. McHale: I think that's it. It is not true. It is not true insofar as——

The Court: You say it isn't true that the civil tax liability has been determined but the fraud liability or criminal liabilities are open.

Mr. McHale: The civil liability hasn't actually—well, I am not sure of that. I would say that their petition for redetermination of civil liabilities has been filed. But as far as we are concerned

here it is not material to this because once an action has been filed in a tax court with respect to that civil action they have the use of civil process. Certainly Tucker is not using this action in furtherance of any tax court proceeding.

The Court: Now, the respondents' fourth defense, if sustained, would be a good defense, would it not?

Mr. McHale: If they could sustain the allegations perhaps it might be. However, as I read from Judge Hall's opinion, this is an investigation of a third person, and I don't think there is any—except pure unreasonableness—I don't think there is any reason that a third person can restrict an examination of a taxpayer's returns if they require inspection of his books and records.

The Court: It might be oppressive.

Mr. McHale: It conceivably could be, your Honor. [87]

The Court: Now, the sixth defense, notice of additional inspection. You have touched something upon that, but that defense is pleaded, and if true, would be a good defense, would it not, having in mind the last sentence, "The examination sought by the summonses is unnecessary"?

Mr. McHale: I don't think, your Honor, that the third person witness is in a position to raise that. Now, there is some question about that, but—

The Court: This is a response by all.

Mr. McHale: All right. Very well. If it was unnecessary I suppose if they could prove it was unnecessary, that would be true. But I think the

petitioner has sustained his burden here of showing, first, this examination never ended——

The Court: But in considering whether or not these are defenses we must bear in mind that the response here is made by the individuals and the corporation.

Mr. McHale: I am sorry. I tend to forget that, except for the fact that it is made by the individuals only—they are brought in here as respondents in their corporate capacities as officers of the corporation; that is, to produce the books and records which they as the officers of the corporation hold. But saying that they could raise that, I feel that we have borne our burden there in any event.

The Court: Now, the next defense, the seventh. "The petitioner lack authority." If that were [88] true that would be a good defense, wouldn't it? The question of collection of a fraud penalty is open, isn't it?

Mr. McHale: It certainly is, your Honor. And the question of their liability under the criminal law is certainly open.

The Court: But as a defense, if sustained, that would be good, wouldn't it?

Mr. McHale: I think if Tucker had absolutely no authority they would be void.

The Court: And the same with the eighth defense; if sustained it would be a good defense, would it not? "The records are not material."

Mr. McHale: With respect to the corporation I think the cases don't permit the third person witness to go into the materiality or relevancy.



The Court: Again we have the individuals here.

Mr. McHale: Yes, we do, but——

The Court: If this summons were issued only to the corporation, it would not lie in the mouth of the corporation to say that the records were immaterial.

Is there anything further?

Mr. McHale: Nothing except to summarize. I did refer to that affidavit of Mr. Tucker in Action 1774, which has been introduced as Government's Exhibit, and on page 2 he says,

“Preliminary investigation of the taxable [89] years 1950 and 1951 of the Borens shows that in excess of \$40,000 of taxable income was not reported by the taxpayers as required by law. No evidence has been discovered to date tending to show that this nondisclosure was due to mistake, inadvertence, or other justifiable or legal reason, or tending to show that it was not done with the purpose and intent to evade and defeat the payment of the taxpayers' income taxes.”

In summation I say that the petitioner has shown that he has reasonable cause to believe, as he alleges in his petition, that they have filed false or fraudulent returns with intent to evade the tax or may have willfully attempted to defeat or evade the taxes imposed by the Internal Revenue Code. And for that reason it is within the power of the court to compel the respondents to produce the records. And it is also within the power of the court to permit the photostating or photographing, perhaps under the the court's supervision of those records.

The Court: What do you say to the contention

that the photographing would constitute a seizure?

Mr. McHale: I believe it wouldn't, your Honor. We cited some cases here where the—admittedly this is a field in which there isn't much law, because I don't think this question—— [90]

The Court: We do it every day, civilly, under Rule 34; compel the production of documents for copying or photographing.

Mr. McHale: Yes. I think that with respect to this sort of proceeding it is almost never used because ordinarily with respect to a trial, tax evasion, say, the summaries prepared by the agents of the checks and so forth and absence of the originals, could be used in evidence. But here we have a particular question which the Government has laid its cards on the table and showed the court and counsel that we believe that there are what amounts to forged endorsements on these checks. And that requires the use of a document examiner to determine exactly who endorsed the checks and who received the income. And for this particular purpose we think it is within the general power of the court under these sections that have been cited to the court to compel the checks to be produced and photostated.

Mr. Brant: Just a very few brief remarks, your Honor.

With reference to this question of photostating or photographing these checks, there is something I feel compelled to call to the court's attention, and that is that this is relief which was never requested in the petition. There is no mention of it in the petition whatsoever. They merely seek, one, to hold us

in contempt; or, two, to require us to appear and permit them to examine them. This is relief [91] which apparently comes only out of the affidavit filed by Mr. Tucker and is not part of the petition.

Secondly, I should like to mention briefly this continuing examination or continuing investigation concept which apparently is here involved. I gather from the statement that where you have a continuing examination that you may repeatedly, without any limitation whatsoever and for as many times and on as many occasions as the particular agent might desire, may examine and re-examine and re-re-examine the books and records of a party. I don't think that is authorized by the statute.

There is also this question of whether or not the tax liability has been determined. There the Commissioner has determined in connection with all three respondents, one, their civil tax liability; and, two, he has asserted civil fraud penalties against each one of them. The only thing that he——

The Court: Have they been determined, the civil——

Mr. Brant: That is the determination. Now, he bears the burden of proving that. The Commissioner bears the burden of proving the fraud assertion, that penalty, when he gets into the tax court. But that is a determination.

The Court: Well, isn't he entitled to make some discoveries for the purpose of being able to prove it?

Mr. Brant: Absolutely, your Honor, and through the tax court. But you will recall that Mr. McHale just now mentioned, [92] and I wrote it down quick-

ly as he stated it, that the petitioner here is not using this process in this court in furtherance of any of the tax court proceedings. And I submit what else could he be seeking these records for. And the only conclusion that I can come to is that he is not using it in connection with the tax court proceedings and the only thing he could be using it for is criminal liability. And I submit that that is unauthorized.

The Court: Why wouldn't that be a permissible use?

Mr. Brant: The statute authorizes an examination to determine the correctness, to ascertain the correctness of any return. That is not a part of a criminal case at all. It may well be a part of the civil tax fraud penalties which the Commissioner in this case has asserted against all three of the taxpayers. It might well be a part of it. And he might well examine for this. But counsel has admitted just a few minutes ago that he wasn't using it in furtherance of the tax court proceeding. The only thing that I can see he is using it for now is for the criminal proceeding. And the administrative summons, as pointed out in *U. S. v. O'Connor*, notwithstanding the fact that that was after indictment, they were seeking information to help improve their case, the court points out that you can't use an administrative summons for this purpose. They want information. There are rules of criminal procedure which authorize them to get information [93] by doing certain things, and we submit they should use those procedures and not use an administrative summons for that purpose.

The Court: Anything further?

Mr. McHale: All I meant to say, your Honor, with respect to this one statement I made with respect to furthering a tax court proceeding is that I understand that if an additional fraud assessment were made, which could be made at any time as a result of this later thing, it wouldn't refer to the particular action now pending in the tax court but would be an additional assessment. And I meant that we weren't using this with respect to discovery in the particular proceeding now going forward. I think the Borens have petitioned for one year. [94]

\* \* \* \* \*

December 6, 1955; 5:40 o'clock p.m.

\* \* \* \* \*

The Court: The motion of the petitioner to strike the Second and Ninth separate defenses in the respondents' answer to the petition is granted. And, otherwise, the motion to strike is denied.

The separate defenses which stand are not sustained. The petition is sustained.

The prayer of paragraph IV, the prayer of the petition, in my opinion is sufficient in asking for other and further relief as to warrant the order with respect to copying or photographing.

The petition is granted to the extent that the respondents are ordered to appear and give testimony in response thereto and to produce the documents therein set forth in the summons, Exhibits A, B and C to the petition.

Now, you have a problem of mechanics with respect to this photostating; and also a problem of



the time. When does the petitioner wish this proceeding to continue?

Mr. Tucker: At the earliest possible date, your Honor.

The Court: Tomorrow?

Mr. Tucker: That would be agreeable.

The Court: Is there any reason why it shouldn't go ahead tomorrow?

Mr. Brant: Only the mechanical problem of assembling the records and delivering them, your Honor. Tomorrow is— I believe we could comply tomorrow, yes, your Honor.

The Court: Wednesday?

Mr. Brant: Wednesday would be preferable, yes.

The Court: Very well. At this 6th Avenue address?

Mr. Brant: Yes, your Honor.

The Court: 3755 6th Avenue. Is that practicable?

Mr. Brant: For me?

The Court: Is it practicable to transport these records——

Mr. Brant: Yes, your Honor.

The Court: Very well. Then the respondents are ordered to appear at 3755 6th Avenue, San Diego at 10:00 o'clock on the morning of December 7, 1955, and produce the records called for in the summons and then and there give testimony with respect thereto as required by the summons. And in the event they fail so to appear or produce the records or to give the testimony required of them at that time, they are to appear before this court on December 13th next at 10:00 o'clock and then and there show cause, if any

they have, why they and each of them shall not be held in civil contempt of this court and penalties assessed accordingly.

The Government will prepare and settle under Local Rule 7 within three days findings of fact, conclusions of law and order accordingly.

Mr. Brant: Your Honor, would it be possible for the examination date to be contemporaneous with or immediately follow the date on which they file the findings of fact and conclusions of law? That would permit me to have a little better opportunity to make an examination of what the next course of action would be.

The Court: You mean Thursday?

Mr. Brant: If they have three days; the day following that.

The Court: Well, let's not give them three days; because the more time you take for these things, sometimes, the more time that is taken, or found necessary to be taken.

How much time do you need, Mr. McHale? This is a summary proceedings and has been too long delayed now.

Mr. McHale: If I prepared them tomorrow—Will your Honor be in San Diego or in Los Angeles?

The Court: I'll be in Los Angeles tomorrow afternoon.

Mr. McHale: I can submit them to your Honor by Wednesday morning, I presume; but then——

The Court: Submit them to Mr. Brant for his approval as to form. If you gentlemen can collaborate on them, why,——

Mr. McHale: I was thinking of going back to

Los Angeles, and it's a question of communicating, but——

The Court: Can you prepare them here?

Mr. McHale: Not until tomorrow, in any event.

The Court: Perhaps you can collaborate with Mr. Brant and prepare them here tomorrow and get his approval as to form, and then you would have them.

Do you wish until Thursday on the order to appear?

Mr. Brant: I would like to see what kind of findings of fact and conclusions of law we have before I—It will better permit me to evaluate the position of the respondents from here on out, your Honor, if we have the findings of fact and conclusions of law settled before the examination.

I think counsel will agree that there is no danger in connection with the destruction of these records, or any great urgency. So if we could have just one day after the date on which findings should be filed that would be adequate, your Honor.

The Court: Prepare them tomorrow, and we will have the examination Thursday.

Mr. Brant: That would be satisfactory, your Honor.

Mr. McHale: I will try to prepare them tomorrow, your Honor.

The Court: Just lay everything else aside and do it, now.

Mr. McHale: Yes, sir, I will do that.

There is one further thing your Honor, in your Honor's order that the respondents are to appear

at—I think it's 3755 6th Avenue to testify and produce records. There are no photostating or photographing facilities at that address.

The Court: Well, that's what I was coming to now, the question of mechanics. How are you going to work that out?

I can have them placed in the custody of the clerk and the clerk make photostatic copies.

Mr. Brant: Your Honor, I think it could be worked out in this manner: If your Honor is going to order the taxpayers to submit to the photostating of these records, Mr. McHale and I can work out an acceptable arrangement for handling the mechanics of the photostating, to have that done. I am certain of that. The only question that I ever had in mind was his entitlement to the copies. Once your Honor has established that, why, the manner of doing it is one that we can easily work out, I am certain.

The Court: Very well. Then the respondents will understand that they are to appear and produce the records called for by these three summons at 10:00 a.m. on Thursday instead of Wednesday. That will be Thursday, the 8th of December.

Otherwise, the order heretofore made will stand. In the event they fail, or any of them fail, or refuse to appear at 10:00 a.m. on December 8th and give testimony, or to produce and permit the copying or photographing of any of the records called for by the summons, they should appear on the 13th of December next at 10:00 o'clock in the morning and show cause, if any they have, why they should

not be held in contempt, and further proceedings had accordingly.

Mr. Brant: Yes, sir.

Mr. McHale: Could your Honor make an order that if the records be produced that they could be turned over to the clerk of the court for photostating? I spoke to Mr. Childress about this, and he said if the court will make an order he will do the photostating.

The Court: Oh, I assume you gentlemen can arrange to take them to some company down here, can't you?

Mr. Brant: I am certain we can, your Honor. I don't think we will have any difficulty to that extent at all.

The Court: If it must be done through the clerk's office it will take several days, very likely; whereas you gentlemen can probably have it done in a matter of hours.

Mr. McHale: I understand there is a Navy Lab, also, down here that will do it for the Internal Revenue Service.

The Court: I would assume from what Mr. Brant says that there will not be any problem in that respect.

Mr. Brant: No, your Honor.

The Court: The problem will be with respect to his position on the point of the production rather than the photographing, I take it.

Mr. Brant: That is correct, your Honor.

The Court: Very well. Is there anything further?



Mr. Brant: Nothing further, your Honor.

Mr. McHale: Nothing further, your Honor.

The Court: As far as the findings are concerned, gentlemen, in view of the lateness of the hour I didn't undertake to make detailed oral findings. There are very few matters in dispute.

Of course, I find that it is a continuing examination and further examination of the records as necessary to the examination being undertaken to determine whether or not there has been fraud in connection with the returns, as well as possible criminal prosecution. But the statutory basis for the examination is the open issue as to fraud liability. The fact that the information may be used in a criminal prosecution I deem immaterial.

If there are any further specific findings you wish me to indicate, I will be glad to do so now.

Mr. Brant: None at the moment, your Honor.

The Court: Very well. Is there anything further, Mr. Clerk.

The Clerk: That is all today, your Honor.

The Court: Court will adjourn.

\* \* \* \* \*

December 7, 1955: 2:00 o'clock p.m.

The Clerk: Case No. 1780-SD Civil, Lloyd M. Tucker vs. Clifford O. Boren Contracting Co., et al.

Mr. McHale: Ready for the plaintiffs.

Mr. Brant: Ready for the respondents.

This is a motion to stay the enforcement of judgment, and a motion for this court to now fix the amount of supersedeas bond pending appeal of the case.

Your Honor will recall that today a judgment, signed and I understand filed in this action, requires the respondents to appear before the petitioner Lloyd M. Tucker tomorrow morning at 10:00 o'clock a.m. and to produce for examination certain records and to permit the photographing of those records.

The respondents have prepared and intend to file a notice of appeal to the United States Circuit Court for the Ninth Circuit. And that notice of appeal has not been filed as yet, the only reason being that the judgment has not been entered.

The respondents ask for a stay pending appeal on the condition that the appeal be perfected within 30 days; and on the further condition that they deposit in court the amount of the supersedeas bond that may be determined.

The grounds for the motion are that unless the judgment is stayed pending the appeal, the respondents' appeal therefrom would be ineffective and they would be required to deliver up the records tomorrow morning or be in contempt of this court. The latter, of course, the respondents do not wish to do, and we do respectfully submit, your Honor, that a stay of execution should be granted to the respondents under Rule 62 of the Rules, Federal Rules of Civil Procedure.

The Court: What bond do you offer?

Mr. Brant: I would suggest, your Honor, that the respondents are able to furnish any type of bond that your Honor would specify. I would suggest, as a figure—I do not have an expression from

Mr. McHale as to what the petitioner would wish, but I would suggest a thousand dollar cash bond or such other type of bond as your Honor may feel is necessary under the circumstances.

Mr. McHale: Your Honor, the petitioner Tucker opposes this motion, the grounds principally being this is not a final and appealable order; and that the only appeal which can be taken would be from a final commitment of contempt in the event that the respondents failed to comply with the court's order. This is not appealable, and no appeal should be taken from this, and, of course, no stay should be given.

The Court of Appeals in the Ninth Circuit, Chapman vs. Goodman, 219 Fed. 2d 802, had before it an appeal by a witness who took an appeal from an order directing him to appear before an Internal Revenue agent and testify and produce books and records. And in that appeal the Court of Appeals held that the order was one that was not appealable; that an appeal would not lie from such an order. And Judge Hall in the recent case of Huebner vs. Tucker, which is on appeal to the Ninth Circuit, which has been referred to in the briefs of this action, the appeal that was taken in that case was taken from the final order of commitment for contempt.

That, we feel, where the witness finally refused and the court ordered her committed, that is such an order which would be final and appealable; and these other things which took place during the course of the proceedings would become grounds

for an appeal, perhaps, after the final judgment of commitment, or whatever it would be, would be entered.

There is a case in the Seventh Circuit referred to in the case of *Chapman vs. Goodman, Jareki, Collector vs. Whetstone*, 192 Fed. 2d 121, and *Jareki vs. Whetstone*, as I recall it, arose as an enforcement of a Collector's summons. That is, the procedure which has been carried over into the 1954 Revenue Code. And the Seventh Circuit there held that the appeal would lie from the final commitment for contempt, but not from an order directing a witness to appear. For that reason we urge that the motion be denied.

Mr. Brant: I understand that your Honor has before him the case of *Chapman vs. Goodman*, and my remarks in opposition to Mr. McHale's are going to be directed specifically at that case.

In *Chapman vs. Goodman* I think the dictum of the Circuit Court of Appeals for the Ninth Circuit clearly supports our position that the order is now appealable. In that case the court stated,

"This court thinks if the order is one of such finality that it essentially terminates the summary proceedings the order should be and is appealable." And then paragraph (4) states, "In the instant case, while Attorney Chapman has been ordered to appear before Goodman (and if that were all, the order might be considered final) it does not look as though the court below by its order has come to final grips with the ultimate issue, and that time will arrive when it defines by appropriate order what



questions Chapman must answer and what if any documents must be produced.

“In this court’s consideration of this case, it has found *In re Albert Lindley Lee Memorial Hospital*, *supra*, most helpful. It is to be observed parenthetically that there the doctor who was under investigation by the Internal Revenue agent promptly asked to intervene and was granted intervention in the agent’s proceedings against the hospital, custodian of the records, in which the hospital had been ordered to disclose names of patients under care of the doctor who had been received at the hospital within a certain period.

“The proceedings *In re Albert Lindley Lee Memorial Hospital*, *supra*, after the issuance of the original *ex parte* order, appear to have followed the Federal Rules of Civil Procedure, which was within the court’s option under Rule 81(a)(3). They eventuated in a definitive order that clearly outlined the limits of the agent’s possible interrogation. The retained jurisdiction therein was merely ancillary. If the last order of the District Court here had reached an ultimate definition of the scope of permissible examination of the witness as was attained in the order in *Albert Lindley*, this court should hold the order here appealed was appealable.

“Here in Chapman’s case it may eventuate that preliminary examination will develop whether all or part of the mass of papers held by Chapman are entitled to privilege; \* \* \* \* \*”

Your Honor will recall that this was the attorney-



client privilege. “\* \* \* \* or, it may develop that the only way the issue can be finally resolved is by Chapman handing the papers up to the judge of the District Court for his private examination.”

And then there are some citations.

“Certain disclosure is not required until Chapman has exhausted his rights in the courts. Inasmuch as we hold that when a definitive order as to what must be revealed has been made in this case, such an order surely will be sufficiently comprehensive to permit an appeal herein and probably will eliminate the necessity of Chapman falling back on refusing to obey the order, ‘standing upon his rights,’ and then seeking habeas corpus. In jurisdictions where presently the latter procedure is the only remedy for the witness, the contempt is not criminal. It is difficult to imagine the occurrence of anything beyond pro forma detention while the necessary steps are taken to get an appellate review.”

We submit, your Honor, that the order which was entered here today is a final, definitive order, specifying precisely the books and records and documents which must be delivered to petitioner Lloyd M. Tucker, and nothing further is to be done in the proceeding, and the court still retain jurisdiction, of course, for if the respondents fail to deliver up these books and records the court will find them in contempt of court.

The Court: The order is definitive as to the production of the books and records in that it specifies a time and place and specifies what is to be produced.

But is the order definitive as to the questions to be answered? We don't know.

Mr. Brant: I would say it is not, your Honor.

The Court: Then isn't that what would give it the non-final character?

Mr. Brant: That may well have that effect, your Honor. We have not been concerned about the testimony, and as a result I haven't given the matter any consideration. We have been concerned only with the deliverance of the books and records.

The Court: It seems to me that if the order for production stood alone the motion would be well taken, since that order would be final and appealable. Anything further to be done in the proceeding would be in the enforcement of the order. But since the court can't know what the testimony is that may be called for or what questions may be asked, it seems impossible for it to be final as to that because there would have to be a hearing upon the order to show cause, a hearing as to whether or not these respondents can properly be ordered to answer the questions, if any, which they refuse to answer; and then a further order made directing them to answer, or holding them in contempt if they fail to do so.

Mr. Brant: My only concern, of course, is not to have my clients be advised into contempt or to be committed for contempt, and I had hoped to in some manner, through this procedure, prevent that from coming about, your Honor. I find it very difficult myself to advise my clients to be contemptuous of the order of the court, and yet they do have

the right of appeal and they want to exercise that right.

I might also comment, your Honor, if I may, that the record will show that the respondents did appear originally before the petitioner and did give testimony but did not deliver up to him the books and records. In the record I don't believe there is any objection as to any question which was asked by the petitioner.

The Court: It seems to me, Mr. Brant, that this case of Chapman against Goodman, 219 Fed. 2d, 802, doesn't give us any room to debate whether part of this order might be final or not. But probably it is all interlocutory in character for the reasons expressed by Judge Chambers in the Chapman case. As to the testimony to be given, it is clearly not final because we don't even know what questions may be asked and what objections, if any, may be interposed.

And as to production of documents, while the order specifies what is to be produced, you don't know what evidentiary objections may be made, if any, at the time, or whether there might be some claim of privilege made, as was involved in the Chapman case. So the order as Judge Chambers interprets it is this, your client is directed to produce these records at the time and place of hearing. That means to bring them there and appear there and be there. If they wish to assert claims of privilege, if there are any, or any other evidentiary objections, of course they may be asserted at that time. And then pursuant to further order

to show cause they would be required to appear on the 13th of December and show cause why they shouldn't be compelled to answer, or be held in civil contempt for failure to do so.

As to the failure to submit for inspection or offer for examination or photostating any of the documents, if there is a claim of privilege, if there is some new claim asserted, that objection would have to be heard and there might be necessary a further order before your client would be brought into contempt. So, as I interpret the order, the only way they could be brought into contempt under the order issued would be by failing to appear or by failing to bring with them the records and produce them then and there in the presence of the petitioner or the revenue agent, produce the documents specified.

Is that in accord with your interpretation of the order, Mr. McHale?

Mr. McHale: Yes, your Honor.

The Court: So as I view it you are not yet confronted with any final order overruling possible objections to, or possible claims of privilege to, the evidentiary use of the documents.

So the motion for a stay as to the existing order will be denied. And you prepare and settle under Local Rule No. 7 within three days a formal order embodying the rulings made here today.

Mr. McHale: Yes, your Honor.

Mr. Brant: Thank you, your Honor.

The Court: Anything further, Mr. Clerk?

The Clerk: That is all this afternoon, your Honor.

Tuesday, December 13, 1955; 11:45 a.m.

The Clerk: Case No. 1780, Clifford O. Boren Contracting Co., Inc., et al.

Mr. McHale: Ready, your Honor, for the petitioner.

Mr. Brant: Ready for the respondents.

The Court: Are the respondents present?

Mr. Brant: Yes, your Honor, they are.

The Court: Let me see the file, Mr. Clerk.

Mr. McHale: Your Honor, pursuant to the order of the court the respondents appeared before the petitioner on December 8, 1955 but did not comply with the order of the court and, therefore, have returned today.

The Court: In what particular did they fail to comply; one to appear; two to testify and three—

Mr. McHale: They appeared, your Honor. They testified. But they did not produce the books, records, papers and pay roll checks that they were required to produce, and refused to do so.

I have here a transcript of the proceedings, which Mr. Brant has been furnished with. May it be stipulated it is a true copy?

Mr. Brant: It certainly may. But I think we can shorten it even a little more than that, your Honor.

I think it can be stipulated that the respondents, all three of them, did appear; they did testify; they did produce the specified books and records—that is, by bringing them with them. They respectfully



declined to permit the copying, examination or photostating of the records.

The Court: Very well. Do you wish to file a transcript?

Mr. McHale: Yes, I do.

The Court: Is it stipulated to be a true transcript of the proceedings before the agent?

Mr. Brant: Yes, your Honor, so stipulated.

Mr. McHale: I have an additional copy for the court's convenience.

The Court: Very well. The transcript will be received as Petitioner's Exhibit next in order upon this hearing.

Mr. McHale: I don't wish to stipulate that they produced the books, records and papers.

The Clerk: I don't know what the next number is, your Honor.

The Court: This would be a new hearing. It will be Government's Exhibit No. 1 on this hearing.

(The exhibit referred to was marked Petitioner's Exhibit 1 and received in evidence.)

[See pages 207-214.]

The Court: I didn't understand your last remark.

Mr. McHale: Mr. Brant offered a stipulation, but I didn't want to be in the position of stipulating that they produced the books and records.

The Court: Is it agreed they had them with them?

Mr. McHale: Yes.

The Court: Well, that's production as I understand it. "Production" is a very indefinite term.

I think it is unfortunate; and after our hearing the other day in Los Angeles I regretted that I didn't change that. The old form of "bring with them" is the better form, I think, because it has meaning.

Mr. McHale: I agree with your Honor.

The Court: "Bring with you and there produce for examining, copying and photostating."

So it is stipulated, I take it, that these respondents brought with them at the time and place ordered these specific records?

Mr. Brant: It is so stipulated, your Honor.

The Court: Is it so stipulated by the Government?

Mr. McHale: Yes, your Honor.

The Court: So the only failure of compliance, as I understand it, is agreed to be that they refused then and there to permit examination or copying or photostating or photographing of any of the records then and there brought with them.

Mr. McHale: That's right, your Honor.

Mr. Brant. That's correct, your Honor.

The Court: And what are the grounds upon which that refusal was based?

Mr. Brant: Your Honor, the grounds are set forth in the affidavit of the respondents on file in this case; and at the time of the hearing the respondents made this statement to petitioner:

"In response to the order of the United States District Court, Clifford O. Boren, president of the Clifford O. Boren Contracting Company; Delta M. Boren, vice president of the Clifford O. Boren Contracting Company; and the Clifford O. Boren Con-

tracting Co., Inc., appeared before Special Agent Lloyd M. Tucker at the time and place specified in the order and there produced the records called for by the summonses. They and each of them respectfully declined to permit the examination, copying or photostating of the records for the reasons set forth in their answer to the petition filed by Petitioner Lloyd M. Tucker in this action and to enable them to appeal the judgment of this court to the United States Court of Appeals for the Ninth Circuit."

And that is, essentially, your Honor, the reason why the respondents have at this time, or did at the time of the appearance before Mr. Tucker, decline to permit the copying, examination and photostating of the records. They felt it necessary, on the advice of counsel, to do so in order to enable them to appeal the decision of this court.

The Court: That's the only ground?

Mr. Brant: That is the only ground, yes, your Honor.

The Court: I take it you are relying upon the authority we discussed the other day.

Mr. Brant: Yes, your Honor.

The Court: Will you give the citation for the record?

Mr. Brant: I can if the court will be indulgent just one moment.

The Court: Yes.

Mr. Brant: The name of the decision, as I recall it, is Chapman vs. Goodman, a decision of the

Circuit Court of Appeals for the Ninth Circuit, and the citation is 219 Fed. 2d, 802.

The Court: Mr. Bailiff, will you get that, please?

Do the respondents have with them today the records?

Mr. Brant: They don't have them in their physical possession. They are in my office and immediately available.

The Court: Is the petitioner Tucker present?

Mr. McHale: Yes, your Honor.

The Court: How voluminous are the records? Can they be brought here without any inconvenience?

Mr. Brant: It would be a load to bring them down, but not too inconvenient to bring them down.

The Court: One of the difficulties of this order made, as we discussed the other day, as far as the testimony is concerned it couldn't be final as far as the testimony is concerned—that is, as far as the order to give testimony is concerned—because of the impossibility of knowing what questions would be asked and what questions the witness would be called upon to answer.

As to the production of the records for examination, copying and photostating, standing alone the order is such as could bring the respondents into contempt by their failure. But to obviate any possibility of any contention that the order of December 7th is not sufficient, I will order that the respondents appear here at 2:00 o'clock this afternoon—the petitioner will appear, also—and bring

with them the records called for in the summonses, and then deliver to petitioner for examination, copying and photographing or photostating, the records in question.

In other words, I will treat it like a grand jury proceeding, and when they appear this afternoon I will make the order again that they then and there deliver over to the petitioner for examination and for copying and for photographing or photostating, in the custody of the clerk. Or, to state it more accurately, to deliver over to the clerk into his custody for examination and copying or photographing or photostating by the petitioner Tucker, the records in question.

Mr. Brant: Yes, sir.

The Court: And if the respondents refuse so to do they will bring themselves into civil contempt of the court.

Mr. Brant: Yes, your Honor. May I make one inquiry, your Honor? The only reasons why the respondents would refuse so to do are the reasons set forth in our answer. If we so decide, may that this afternoon be stated by reference, or would you prefer to have me make a digest of these various reasons set forth in our answer?

The Court: Well, if you have already stated all the reasons——

Mr. Brant: I have stated all the reasons, yes, sir.

The Court: Then you may merely say, “for the reasons heretofore stated \* \* \*”

Mr. Brant: Yes, sir. It is possible that this



might be—unless your Honor so desires—your suggestion might be taken care of by stipulation between counsel. They have so produced the records and——

The Court: Of course, if they refuse in the presence of the court, why, that could be a criminal contempt, also. But there is no disposition on the part of the Government, I take it, to——

Mr. McHale: We are treating this as a civil matter, your Honor.

The Court: ——proceed otherwise than by civil contempt.

So the record will be clear I suggest that it be done; and that will be the order.

Mr. Brant: Thank you, your Honor.

The Court: We will take this up then right at 2:00 o'clock, gentlemen.

Mr. Brant: Thank you very much.

The Court: We will recess until 2:00.

(Whereupon a recess was taken until 2:00 o'clock p.m. of the same day.)

December 13, 1955; 2:00 o'clock p.m.

The Clerk: Case No. 1780, Lloyd M. Tucker, etc., vs. Clifford O. Boren Contracting Co., Inc., et al.

Mr. McHale: Ready for the petitioner.

Mr. Brant: Ready for respondents, your Honor.

The Court: Are the respondents ready?

Mr. Brant: Yes, your Honor, they are.

The Court: Clifford O. Boren. Let him come to the bar.

Delta M. Boren. If you will just stand with your counsel.

Do you have with you the general journal, the cash journal, the general ledger, the pay roll records and the payrolls checks described in the summons issued by the petitioner Lloyd M. Tucker and heretofore served on you?

Mrs. Delta M. Boren: Yes, your Honor.

The Court: You have them with you?

Mr. Clifford O. Boren: Yes, we do.

The Court: They are 1951 records I observe. Have they been separated from the later records of the corporation?

Mr. Clifford O. Boren: Yes, sir.

Mrs. Delta M. Boren: Yes, sir.

The Court: So they are here as a separate group of papers, are they?

Mr. Clifford O. Boren: Yes, sir.

The Court: Very well. It is the order of the court to each of you that you now deliver those records into the custody of the clerk for examination, copying and photographing or photostating by the petitioner, Lloyd M. Tucker, special agent of the Internal Revenue Service.

Mr. Clifford O. Boren: On advice of counsel I must respectfully decline to obey the court's order.

Mrs. Delta M. Boren: I, too, on advice of counsel must respectfully decline to obey the court's order.

The Court: Do you wish to state any other reasons for your refusal?

Mr. Clifford O. Boren: My reasons are those set forth in the answer to the petition filed in this court.

Mrs. Delta M. Boren: My reasons are those set forth in the answer to the petition filed in this case.

The Court: Very well. It is now the judgment of the court, Clifford O. Boren and Delta M. Boren, that each of you be committed to the custody of the Marshal of this court, to be by him imprisoned in a jail-type institution until the affirmative order of this court is obeyed. I don't think there is any question in your mind as to what the order is, is there? You both feel you understand the order?

Mr. Clifford O. Boren: Yes.

Mrs. Delta M. Boren: Yes.

Mr. Brant: If the court please, would that also include the Clifford O. Boren Contracting Co., Inc.? All three, the two individuals and the corporation itself, are parties to this action.

The Court: As to the corporation the most I could do is fine it to cover the expenses of the Government in the civil contempt action. There is nothing penal with respect to it, or punitive.

What expense has the Government been put to in connection with this proceeding?

Mr. McHale: The expenses, your Honor, have been primarily those of travel; that is, of counsel from Los Angeles——

The Court: Just give me the estimate of what——

attorneys for the Government don't cost anything?

Mr McHale: Well, yes, salaries, of course.

The Court: I asked you for an estimate of the expense that you have been put to in this proceeding.

Mr. McHale: I would estimate, your Honor, that to date the expenses would be approximately——

The Court: This is the expense you have been put to by reason of the failure or refusal of the respondents to obey the summonses and the order of the court.

Mr. McHale: Yes. I would estimate, your Honor, that the expenses of travel of counsel and the agent who had—if that could be included. I don't——

The Court: I should think that you might only recover for the expenses occasioned by the contempt, the refusal to obey the order of the court.

Mr. McHale: For this proceeding I would estimate \$25 for this proceeding today; that is, the expense of travel down here today. I would say with respect—you Honor is limiting it only to today's proceedings, is that not correct?

The Court: The expenses occasioned by the contemptuous conduct of the corporate defendant here.

Mr. McHale: Well, since your Honor presumably limits it to these proceedings today I would say the cost of travel would be \$25, and the cost of counsel would be \$50.

The Court: The cost of the agent and all other expenses?

Mr. McHale: The cost of the agent we would

estimate to be \$35, your Honor. That doesn't take into account the other appearances that have been made heretofore.

The Court: I take it there has been no damage caused by the refusal to obey except those that have been occasioned subsequent to the order.

How much does all that total?

Mr. McHale: I have a figure of \$110 as to the proceedings with respect to this particular matter today.

The Court: The damages proximately caused to the United States by the refusal of the corporate defendant to obey this order. You say \$110?

Mr. McHale: Yes, your Honor.

I think there are other proximate costs that would enter into this; that is, other appearances before this court which would be occasioned. But if your Honor is limiting it to just today's proceedings, I would say that is the cost.

The Court: As I view it, the only fine that could be assessed would be a compensatory fine to compensate the petitioner, who is an officer of the United States, hence the Government, for the contumacious failure to produce the records for copying, photographing, photostating and making an examination as required by the order of December 7, 1955.

Mr. McHale: Yes, your Honor. That would be my approximation, your Honor.

The Court: Then do the respondents Clifford O. Boren, as president, and Delta M. Boren, as vice president, representing the Clifford O. Boren Con-



tracting Co., Inc., the corporate respondent, now refuse on behalf of the corporation to obey the order of the court to permit the inspection, copying, photostating, photographing of the records in question?

Mr. Clifford O. Boren: Yes, sir.

The Court: Very well. The court also finds the corporation guilty of civil contempt of the court and assesses a compensatory fine against the corporation in the sum of \$110; that fine to be paid the clerk and to be by the clerk in turn, paid over to the United States of America.

The individual defendants may purge themselves of contempt, of course, at any time by complying with the order to permit the examination, copying, photographing or photostating of the records. In the language of the cases they carry the keys to the jail themselves.

Mr. Brant: May I now address the court, your Honor, with reference to a motion?

The Court: You may. Before you do that, the Government will prepare a formal order embodying these rulings and submit it for approval today.

Mr. McHale: Very well, your Honor.

The Court: Will you submit it to Mr. Brant as attorney for the respondents, under the rule, for approval? And I trust you gentlemen can collaborate on it and get it entered today.

Mr. McHale: I am sure we can, your Honor. We have had no trouble in the past.

The Court: Very well.

Mr. Brant: Your Honor, at this time the re-

spondents move the court for a stay of execution of the judgment in this action, the judgment which has just been rendered; and for that purpose to fix the amount of a cash deposit in lieu of the supersedeas bond to be filed by the respondents.

I am informed by Mr. McHale that he will not oppose the motion. And I am also informed that a total bond in the amount of—a total cash deposit in lieu of the supersedeas bond in the amount of \$1,000 would be adequate from his standpoint for the protection of the Government.

Mr. McHale: I think that lies within the court's discretion here.

The Court: Is there any objection, first, to the motion to stay, the writ of supersedeas here, to stay the execution?

Mr. McHale: No objection, your Honor.

The Court: Is there any statute of limitations about to run?

Mr. McHale: No, your Honor. I understand that the first statute would be 1957, I believe. In view of your Honor's comments the other day, we voice no active opposition.

The Court: If there is any occasion that the Government would be prejudiced by a stay, I will hear from you.

Mr. McHale: Well, the only thing is that this sort of proceeding is summary in nature and there are statutes running. But I must advise the court that the statute will not run until, I believe, March 1957, the earliest statute.

The Court: The court in Chapman against Goodman, 219 F. 2d 802, at page 806 states,

“This court thinks if the order is one of such finality that it essentially terminates the summary proceedings the order should be and is appealable.”

And then it goes ahead to discuss later the retained jurisdiction. It intimates that if the retained jurisdiction is merely ancillary the order may be of that finality which renders it appealable.

I take it the order here made is now certainly—the order made today, which, Mr. McHale, you should prepare also a formal order covering the rulings made this morning, affirmative order directed to these respondents this morning——

Mr. McHale: Yes, your Honor, I will prepare that.

The Court: ——and this afternoon. And then a subsequent order adjudging them guilty of civil contempt, and the orders made on the contempt. So there will be two orders to be prepared.

Mr. McHale: Yes, I will do that.

I want to point out to the court that I feel that this order now is an appealable order. My objection the other day was, of course, that it was not a final order.

The Court: Yes. You prepare the appealable order; the order made this afternoon; and then, subsequently, the refusal and the finding of contempt.

Is there any reason why these records shouldn't be impounded with the clerk?

Mr. Brant: No, there is not, your Honor.

The Court: Very well. The court will grant the motion for a stay of execution pending appeal and fix the bond—is the suggested amount a thousand dollars?

Mr. Brant: Yes, your Honor; the total of three of \$1,000.

The Court: Is that amount agreeable to the petitioner?

Mr. McHale: Yes, your Honor.

The Court: Fix the amount of the supersedeas bond in the sum of \$1,000 upon the condition that the records here in court be delivered to the clerk, delivered into the custody of the clerk. You may seal them before you deliver them into the custody of the clerk if you like. Deliver them in the custody of the clerk under seal and he will keep them under seal pending further order of the court, either of this court or the Court of Appeals.

Mr. Brant: Your Honor, I have already prepared a form of cash deposit in lieu of supersedeas bond subject to the same conditions as are required by Rule 26 and Rule 73, and I am now prepared to submit that form to the court and also to submit the cash deposit to the court. Mr. McHale has had copies of these forms and I understand that from the standpoint of the form they do meet with his approval.

The Court: Well, you gentlemen have quite a bit of work to do this afternoon, three orders to be prepared, and I suggest that you prepare those and return later and we will sign them all later this afternoon.

Mr. McHale: Very well, your Honor.

The Court: Do you wish to seal them first?

Mr. Brant: I would prefer to seal them.

The Court: Well, either you can seal them or the clerk can seal them.

Mr. Brant: I prefer that the clerk do that, your Honor.

The Court: Very well. The clerk will seal them and keep them under seal.

Now, is it stipulated that what is delivered to the clerk comprises—I think you had better describe them and get a stipulation in the record as to what is now being delivered to the clerk and then deliver them to the clerk item by item so that he can keep them separate.

Mr. McHale: Of course, your Honor, on these records you understand the petitioner has never seen them. I mean, they have been produced, and this is what the parties said are the records. Of course, we can't stipulate as to——

The Court: At least we will have the statements of the respondents on the record as to what is delivered to the clerk.

Deliver it item by item, if you will. Let's keep them in the same order as they are in the summonses for the purpose of regularity. First is a general journal for a certain period, and you are handing the clerk certain sheets from the general journal of the corporate respondent Clifford O. Boren Contracting Co., Inc.?

Mr. Brant: That is correct. I am handing to the clerk of the court a document which is the general



journal entries for the period July 1, 1951 to December 31, 1951. This document consists of 18 pages. The numbering is——

The Court: Nine sheets?

Mr. Brant: Nine sheets, yes, your Honor. In addition, contained within here are numerous typewritten sheets that are attached to the individual sheets.

The Court: Very well. You may hand it to the clerk, if you will, now.

There have been exhibits marked, have there not, in the other proceedings?

The Clerk: In the other proceedings A, B and C, I think, have been marked. I think, however, this morning you started a new hearing and we marked Government's Exhibit No. 1 in this proceeding.

The Court: Very well. Let this be then Respondents' Exhibit A.

(The exhibit referred to was marked Respondents' Exhibit A for identification.)

The Court: Next is a cash journal. I am taking these in the order in which they appear in Exhibit A attached to the petition in 1780.

Mr. Brant: I hand to the clerk a group of 30 sheets entitled on the first sheet "Clifford O. Boren Contracting Co., Inc., daily journal, fiscal year 1951-52."

This covers the period July 1st—the particular sheets that I hand him cover the period July 1, 1951 to December 31, 1951. And this document is

the so-called cash journal of the contracting company for the period.

The Court: That will be sealed and marked under seal as Respondents' Exhibit B for identification in this proceeding.

(The exhibit referred to was marked Respondents' Exhibit B for identification.)

The Court: Next is the general ledger, is it not?

Mr. Brant: I was starting to count the particular sheets.

The Court: Is it bound?

Mr. Brant: Yes, your Honor.

The Court: Would it be necessary, do you think?

Mr. Brant: As far as I am concerned it is not, your Honor.

The Court: Bound with a flexible cover? Bound general ledger for what period?

Mr. Brant: The period July 1, 1951 to December 31, 1951, your Honor. This is the general ledger for the specified period.

The Court: Very well. It will be placed under seal by the clerk and marked under seal as Respondents' Exhibit C for identification in this proceeding.

(The exhibit referred to was marked Respondents' Exhibit C for identification.)

Mr. Brant: The next item, your Honor, is the pay roll records. The pay roll records for the period July 1, 1951 to December 31, 1951, consist of two sets of documents; the first being a bound

folder entitled "Clifford O. Boren, Contractor, San Diego, California; the corporation pay roll for July through December 1951." This is the first part of the pay roll records.

The second portion of the pay roll records are individual earnings records, the number of which I do not know, but they are enclosed within a file box. I submit both of these to the clerk at this time.

The Court: The pay rolls and the pay roll checks are designated separately. Suppose you separate the checks.

Mr. Brant: I have the checks already separated.

The Court: Very well. The pay roll records you last described will be kept by the clerk under seal as Respondents' Exhibit D for identification in this proceeding.

(The exhibit referred to was marked Respondents' Exhibit D for identification.)

Mr. Brant: The next item called for by the summons, "Pay roll checks bearing the endorsements of any of the following named persons:—" and naming them.

I submit to the clerk 120 pay roll checks bearing endorsements specified in the summons.

The Court: Those will be kept under seal as Respondents' Exhibit E in this proceeding.

(The exhibits referred to were marked Respondents' Exhibit E for identification.)

The Court: Now, you have an undertaking, have you, to stay the execution?

Mr. Brant: I have a cash deposit in lieu of an undertaking. I have with me a certified check in the amount of \$1,000 cash, together with a deposit statement conditioned as a supersedeas bond is to be conditioned, and also subjected to Rule 8(c) of the Local Rules as cash deposits are required to be. I have that here, and——

The Court: Is that in a form agreeable to the petitioner?

Mr. McHale: I believe so, your Honor.

The Court: Very well. You may submit that now. And that will obviate the further necessity of an appearance by Clifford O. Boren and Delta M. Boren later in the day.

Mr. Brant: I would like permission at this time, your Honor, since this document contains a recital of a notice of appeal to file with the clerk at this time the notice of appeal.

The Court: You may file the notice of appeal.

It is intended that this be security for bail pending appeal insofar as the individual respondents are concerned?

Mr. Brant: For the complete fulfillment, your Honor, of this judgment. I have tried to use almost the identical language of the rule of civil procedure which conditions bonds of this type. It is for the complete fulfillment of the judgment or any modified judgment.

The Court: Is it satisfactory as to form, Mr. McHale?

Mr. McHale: I believe so, your Honor.

The Court: It is my understanding that this

thousand dollars is deposited as supersedeas bond containing the usual conditions of a supersedeas bond in a civil judgment and in addition serves as a security for bail pending appeal of these individual respondents that they will submit themselves to the custody of the court again, and the custody of the Marshal,——

Mr. Brant: We submit it with that intention, your Honor.

The Court: ——in the event the judgment is affirmed.

Mr. Brant: Yes, sir.

The Court: Very well. Upon that understanding I will approve the cash deposit in lieu of supersedeas bond and accept the deposit upon the condition that it will serve not only as supersedeas bond but as bail pending appeal for the respondents Clifford O. Boren and Delta M. Boren.

Mr. Brant: Yes, your Honor.

Does your Honor desire a formal order granting our motion? It is my understanding that the supersedeas bond or cash deposit in lieu thereof, under the rules in and of itself is sufficient to operate as the stay. I have prepared and would be willing to submit later this afternoon, if your Honor desires, a formal order to that effect. It is my understanding that under the rules the approval of the bond is all that is necessary.

The Court: Yes, I prefer that you submit a formal order which would recite that the supersedeas bond is granted upon the condition that this deposit be made and that the deposit serve not



only as supersedeas for the judgment for the fine but also in the nature of security for bail pending appeal as to the respondents Clifford O. Boren and Delta M. Boren individually.

Mr. Brant: Yes, sir. Thank you, your Honor.

The Court: Very well. I will anticipate then that you gentlemen will have those orders back later today.

Mr. McHale: Yes, your Honor.

Mr. Brant: Yes, your Honor.

The Court: It will not be necessary for the respondents to return unless you gentlemen think of something. I don't perceive the necessity of the respondents returning.

Mr. Brant: I do not, your Honor.

Mr. McHale: I think not, your Honor. It is just a question of preparing the formal orders.

The Court: Very well. The respondents Clifford O. Boren and Delta M. Boren are now released on bail pending appeal from the custody of the Marshal and they may remain at liberty pending the appeal.

Mr. Brant: Thank you, your Honor.

[Endorsed]: Filed January 3, 1956.

## GOVERNMENT'S EXHIBIT No. 1

Record of Proceedings of the Meeting with Clifford O. Boren, President, Clifford O. Boren Contracting Company, Inc., and Delta M. Boren, Vice President, Clifford O. Boren Contracting Company, Inc., at 3755 Sixth Avenue, San Diego, California, on December 8, 1955 at 10:10 a.m., in pursuance to Order of Honorable William C. Mathes, United States District Judge, December 7, 1955.

Present:

Clifford O. Boren, President, Clifford O. Boren Contracting Company, Inc.

Delta M. Boren, Vice President, Clifford O. Boren Contracting Company, Inc.

John A. Brant, Attorney, representing Clifford O. Boren, Delta M. Boren, and Clifford O. Boren Contracting Company, Inc.

Thomas J. Sullivan, Attorney, Internal Revenue Service.

Forrest P. Calkins, Internal Revenue Agent.

Lloyd M. Tucker, Special Agent.

Marie Travis, Stenographer.

Mr. Brant: I would like to add that the Clifford O. Boren Contracting Company, Incorporated, is also appearing.

Mr. Tucker: Mr. Boren, will you please stand and be sworn? Do you solemnly swear that the answers you will give to the questions asked of you will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. Boren: I do.

Mr. Brant: For the record, Mr. Tucker, I should like to object to the presence at this meeting of any persons other than yourself and your stenographer.

Mr. Tucker: Very well. Your objection is noted. Mrs. Boren, will you please stand and be sworn? Do you solemnly swear that the answers you will give to the questions asked of you will be the truth, the whole truth, and nothing but the truth, so help you God?

Mrs. Boren: I do.

Mr. Brant: May I interrupt, Mr. Tucker, and make a statement. In response to the Order of the United States District Court, Clifford O. Boren, President of the Clifford O. Boren Contracting Company, Inc., Delta M. Boren, Vice-President of the Clifford O. Boren Contracting Company, Inc., and the Clifford O. Boren Contracting Company, Inc. have appeared today before Special Agent Lloyd M. Tucker at the time and place specified in the Order of the United States District Court and have here produced the records called for in the summonses. They, and each of them, respectfully decline to permit the examination, copying or photostating of the records for the reasons set forth in their answer to the petition filed by Mr. Tucker in United States District Court, Civil Matter No. 1780-SD, and also to enable them to appeal the judgment of the United States District Court to the United States Court of Appeals for the Ninth Circuit, and I should like to ask individual responses

from Mr. and Mrs. Boren as to whether this is their statement that I have just given.

Mr. Boren: Yes, that is my statement.

Mrs. Boren: That is mine, too.

Mr. Brant: And the corporation, Mr. Boren?

Mr. Boren: Yes, it is.

Mr. Brant: Thank you.

Mr. Tucker: Mr. Boren, I understand you are here in your capacity as President of the Clifford O. Boren Contracting Company, Inc. Is that correct?

Mr. Boren: Yes.

Mr. Tucker: Mrs. Boren, I understand that you are here in your capacity as the Vice President of the Clifford O. Boren Contracting Company, Inc. Is that correct?

Mrs. Boren: Yes.

Mr. Tucker: Now, I am going to read to you Paragraph 7, appearing on Page 10 of Findings of Fact and Conclusions of Law and Order, Civil Matter No. 1780-SD, Lloyd M. Tucker vs. Clifford O. Boren Contracting Company, et al., "Respondents——

Mr. Brant: Pardon me. Would you tell me—I thought you said Paragraph 7 of the Findings——

Mr. Tucker: Appearing on Page 10.—having failed to sustain any of the defense, the petitioner is entitled to the entry of an Order of this Court directing the respondents, Clifford O. Boren, President, Clifford O. Boren Contracting Company, Inc., and Delta M. Boren, Vice President, Clifford O. Boren Contracting Company, Inc., to appear before

him and produce the following records: General Journal, Cash Journal, General Ledger, payroll records and payroll checks bearing the endorsements of any of the following named persons: Clifford O. Boren, Delta M. Boren, Marjory H. Bell, Betty K. McCarthy, and the Clifford O. Boren Contracting Company, Inc., for the period from July 1, 1951 to December 31, 1951, on Thursday, December 8, 1955, at 10:00 a.m., at 3755 Sixth Avenue, San Diego, California, and in the event of their failure so to comply, they then are ordered to be and appear before this Court at 10:00 a.m. Tuesday, December 13, 1955 in the Southern Division at San Diego, California, to show cause why they, and each of them, should not be held in civil contempt for failure so to comply. Dated this 7th day of December, 1955. William C. Mathes, United States District Judge." Now, Mr. Boren, have you brought with you today the General Ledger of the Clifford O. Boren Contracting Company, Inc.?

Mr. Boren: Yes.

Mr. Tucker: This record that Mr. Boren has in his hand, is that the record?

Mr. Boren: Yes, that's correct.

Mr. Tucker: This particular record, is that the General Ledger for the period July 1, 1951 to December 31, 1951?

Mr. Boren: Yes, it is.

Mr. Tucker: Mr. Boren, have you also brought with you the General Journal for the Clifford O. Boren Contracting Company, Inc. for that same period?



Mr. Boren: Yes, sir.

Mr. Tucker: The record which you have in your hand, is that the record called for?

Mr. Boren: Yes, it is.

Mr. Tucker: And have you brought with you the Cash Journal for the same period?

Mr. Brant: May we have a little side discussion of that record?

Mr. Tucker: Yes.

(Off-record conversation.)

Mr. Tucker: Do you have that particular record there? This record which you are showing me, Mr. Boren, is that the Cash Journal, or Daily Journal, for the period specified?

Mr. Boren: Yes.

Mr. Tucker: And have you brought with you the payroll records of the Clifford O. Boren Contracting Company, Inc. for the period July 1, 1951 to December 31, 1951?

Mr. Boren: There it is.

Mr. Tucker: Is that record which you now have before you the payroll records of the corporation for that period?

Mr. Boren: Yes, it is.

Mr. Tucker: And did you bring with you the payroll checks of the Clifford O. Boren Contracting Company, Inc. for the period July 1, 1951 to December 31, 1951, which bear the endorsements of Clifford O. Boren, Delta M. Boren, Marjory H. Bell, Betty K. McCarthy, and the Clifford O. Boren Contracting Company, Inc.?

Mr. Boren: Yes.

Mr. Brant: I should like to point out that there are 120 of these checks, the same checks as we brought before.

Mr. Tucker: Now, Mr. Boren, will you produce for examination the General Ledger which you brought with you today?

Mr. Boren: I'll have to go back to the statement of the attorney that was given at the beginning of the proceedings.

Mr. Tucker: Mr. Boren, I would like to obtain a direct answer as to whether you will or will not produce the record.

Mr. Boren: I will not, for the reasons stated in the attorney's opening statement.

Mr. Tucker: Mr. Boren, will you produce for examination the General Journal which you brought with you today?

Mr. Boren: No, sir.

Mr. Tucker: Will you produce for examination the Cash Journal which you brought with you today?

Mr. Boren: No, sir.

Mr. Tucker: Will you produce for examination the payroll records?

Mr. Boren: No, sir.

Mr. Tucker: Will you produce for examination the payroll checks?

Mr. Boren: No, sir.

Mr. Tucker: Mr. Boren, with respect to your refusal to produce for examination the records which I have described, will you state your reasons for so refusing?

Mr. Boren: All of the refusals are based on the

opening statements read by Mr. Brant.

Mr. Tucker: Mrs. Boren, will you produce for examination the General Journal of the Clifford O. Boren Contracting Company, Inc.?

Mrs. Boren: I would like to group them all together and state that I refuse to produce the records for the reasons which have already been stated by Mr. Brant, I reaffirm it.

Mr. Tucker: Mr. Boren, will you produce for examination, copying and photostating, the payroll checks of the Clifford O. Boren Contracting Company, Inc. for the period July 1, 1951 to December 31, 1951?

Mr. Boren: No, sir, for the same reason that has been stated before.

Mr. Tucker: Mrs. Boren, will you produce for examination, photostating and copying, the payroll checks of the Clifford O. Boren Contracting Company, Inc. for the period of July 1, 1951 to December 31, 1951?

Mrs. Boren: No, I will not, for the same reasons stated in the opening statement by Mr. Brant.

Mr. Tucker: Now, referring again to the case of Lloyd M. Tucker vs. Clifford O. Boren Contracting Company, Inc., Civil Matter No. 1780-SD, Findings of Fact and Conclusions of Law and Order, I am going to read to you the order appearing on Page 11: "It is hereby Ordered, Adjudged and Decreed that respondents, Clifford O. Boren, President, Clifford O. Boren Contracting Company, Inc., and Delta M. Boren, Vice President, Clifford O. Boren Contracting Company, Inc., and the Clifford O.

Boren Contracting Company, Inc., appear before Special Agent Lloyd M. Tucker on Thursday, December 8, 1955, at 10:00 a.m., at 3755 Sixth Avenue, San Diego, California, and produce for examination, copying and photostating, the records called for in summonses heretofore served upon them and then and there give testimony with respect thereto as required by the summonses, and in the event they fail so to do or give the testimony so required at that time, they are to be and appear before this Court on December 13, 1955 at 10:00 a.m. in the Southern Division at San Diego, and then and there show cause, if any they have, why they and each of them, should not be held in civil contempt of this Court and penalties assessed accordingly. Dated this 7th day of December, 1955. Signed William C. Mathes, United States District Judge." Now, Mr. Boren, I deem that you have failed to comply with this order, and Mrs. Boren, I deem that you also have failed to comply with this order, and I will so inform the Court.

I certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled matter on the date specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at San Diego, California, this 13th day of December, 1955.

/s/ MARIE TRAVIS,  
Clerk-Stenographer

Admitted in evidence 12/13/55.

[Endorsed]: No. 15010. United States Court of Appeals for the Ninth Circuit. Clifford O. Boren, Delta M. Boren and Clifford O. Boren Contracting Co., Inc., Appellants, vs. Lloyd M. Tucker, Special Agent, Internal Revenue Service, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed: January 26, 1956.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

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In the United States Court of Appeals  
for the Ninth Circuit

No. 15010

CLIFFORD O. BOREN CONTRACTING CO.,  
INC., a California corporation, et al.,  
Appellants,

vs.

LLOYD M. TUCKER, Special Agent, Internal  
Revenue Service, Appellee.

STATEMENT OF POINTS ON APPEAL

Appellants herewith present points on which they  
claim the District Court erred:

1. The Court erred in holding that the Appellants  
could not assert as a defense to Appellee's petition  
to enforce compliance with administrative sum-



monses that previous examinations of the books and records demanded in the summonses rendered additional examination unnecessary and oppressive, and made the summonses too general and broad in scope.

2. The Court erred in holding that Appellee is entitled to photograph or photostat the books, records, papers, and payroll checks, and any portion thereof that he deems necessary.

3. The Court erred in holding that Appellee was entitled to re-examine the books and records of Appellant Clifford O. Boren Contracting Co., Inc. without having complied with the requirements of Section 7605(b) of the Internal Revenue Code of 1954.

4. The Court erred in holding that Appellee is entitled to re-examine the books and records under the authority of Section 7602 of the Internal Revenue Code of 1954 where one of the purposes of the re-examination is to obtain evidence for a possible criminal prosecution of Appellants Clifford O. Boren and Delta M. Boren.

5. The Court erred in holding that Appellee is entitled to re-examine the books and records of Appellant Clifford O. Boren Contracting Co., Inc. in connection with the tax liability of Clifford O. Boren and Delta M. Boren for the year 1950 without finding that the books and records are material and relevant to their tax liability for the year 1950.

6. The Court erred in holding that Appellants could not assert as a defense to Appellee's petition that the summonses were not issued upon probable

cause, supported by the oath or affirmation of Appellee or any other person, and that no probable cause was shown by the petition.

7. The Court erred in holding that the petition of Appellee stated a claim upon which Appellants could be held in civil contempt.

8. The Court erred in holding that Appellants had failed to sustain any of their separate defenses.

9. The Court erred in finding that Appellee was entitled to re-examine the books and records of Appellant Clifford O. Boren Contracting Co., Inc. after the expiration of the period for assessment of additional income taxes as to each Appellant.

10. The Court erred in finding that Appellee has reasonable cause to believe that Appellants may have filed false or fraudulent returns with intent to evade the tax or may have willfully attempted to defeat or evade the taxes imposed by the Internal Revenue Code for the calendar years 1950 and 1951.

11. The Court erred in finding that the tax liability of Appellants Clifford O. Boren and Delta M. Boren for the years 1950 and 1951 is now under inquiry and determination by the Internal Revenue Service.

12. The Court erred in finding that the purpose of the re-examination was to ascertain the correctness of the tax returns of Appellants Clifford O. Boren and Delta M. Boren for the years 1950 and 1951.

13. The Court erred in not finding that the purpose of the re-examination is to attempt to procure

evidence for a possible criminal prosecution of Appellants.

14. The Court erred in finding that the books and records demanded in the summonses are material and relevant to the matter of the income tax liability of Appellants Clifford O. Boren and Delta M. Boren for the calendar year 1951.

15. The Court erred in not finding that the factual basis upon which Appellee's authority to issue summonses under Section 7602 of the Internal Revenue Code of 1954 is absent.

16. The Court erred in finding that the re-examination sought by Appellee is necessary.

17. The Court erred in finding that Appellee did not have ample opportunity to examine the books and records of Appellant Clifford O. Boren Contracting Co., Inc.

18. The Court erred in finding Appellants, and each of them, in civil contempt of Court for failing and refusing to produce for examination, copying, photostating or photographing by Appellee the books and records of Appellant Clifford O. Boren Contracting Co., Inc. demanded in the summonses.

TORRANCE & WANSLEY,

/s/ By JOHN A. BRANT,

Attorney for Appellants

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 2, 1956. Paul P. O'Brien, Clerk.